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IMPORTANT FEDERAL STATUTES

ANNOTATED

EDITED BY

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NOTICE.

THE decisions of the federal courts which construe the appellate courts act of March 3, 1891, and which have been published to the present time, are only three in number, one a decision of the Supreme Court and two decisions of circuit courts. In *In re* Claasen, 140 U. S. 200, the Supreme Court holds, (1) that the appellate courts act, approved March 3, 1891, went into immediate operation upon its passage, *e. g.*, that it went into operation so as to permit the suing out, March 21, 1891, of a writ of error from the Supreme Court to review a sentence for an infamous crime pronounced by a circuit court March 18, 1891, in a criminal suit tried in 1890; (2) that a writ of error from the Supreme Court to review a sentence of a circuit court in a criminal prosecution by the United States for an infamous crime is, under the appellate courts act of March 3, 1891, a writ of right; (3) that a citation may be signed by a justice of the Supreme Court under Revised Statutes, section 999, as an authority for issuing the writ of error under Revised Statutes, section 1004; (4) that the Supreme Court has power under Revised Statutes, section 716, to issue a *supersedeas* to stay execution of the sentence of a circuit court in a criminal case, and that this power is not abrogated by the appellate courts act of March 3, 1891; (5) that a justice of the Supreme Court has authority not only to allow a writ of error from the sentence of a circuit court for an infamous crime, but also to grant a *supersedeas* in the case; (6) that the rights of a defendant in a criminal prosecution by the United States in respect to a bill of exceptions stand as they did at the time he was convicted; and (7) that a crime which is punishable by imprisonment in a State prison or penitentiary is an infamous crime whether the accused is or is not sentenced or put to hard labor.

For the opinion in the same case in the court below, see United States *v.* Claasen, 46 F. R. 67.

The third decision is United States *v.* Sutton, 47 F. R. 129 (Circuit Court D. Col. August, 1891. Opinion by Sawyer, J.), holding (1) that a circuit court of appeals has no jurisdiction to review the judgment of a district court (*e. g.*, by writ of error), when the jurisdiction of the lower court is among the questions for review, but that under such circumstances a case must be taken directly to the Supreme Court; (2) that the only criminal appellate jurisdiction given to circuit courts of

appeals is of those minor offenses, which are not punishable by imprisonment in a State prison or penitentiary and where the crime is therefore not infamous, and an appellate review of which is allowed by the act of March 3, 1879, Revised Statutes Sup. 451.

The appellate jurisdiction of the United States Supreme Court over United States circuit and district courts exercised by direct appeal or writ of error seems not to be limited by the pecuniary amount in controversy, except possibly in a few exceptional classes of cases. Section 3 of the act of February 16, 1875 (see p. 20), which raised to $5,000 the previously existing limit of $2,000 to the jurisdiction of the Supreme Court to review the decisions of circuit courts, was expressly repealed by section 14 of the appellate courts act of March 3, 1891. Prior statutes, fixing the limit of $2,000, were repealed by the act of February 16, 1875, and were not revived by its repeal, as Revised Statutes, section 12, provides, that "whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." The appellate courts act of March 3, 1891, imposes no pecuniary limit upon the jurisdiction of the Supreme Court to review directly the decisions of circuit and district courts by appeal or writ of error; neither does any other statute of wide application. There are statutory provisions, not specifically repealed (see pp. 7, 8), which in terms impose a pecuniary limit on the appellate jurisdiction of the Supreme Court in prize cases, in cases arising under the interstate commerce act, and in cases arising under the act of March 3, 1887, authorizing suits against the United States. To what extent these provisions are repealed by the appellate courts act of March 3, 1891, is, in the absence of judicial decision, uncertain.

I shall welcome any suggestions or criticisms, public or private, which may aid me to make this work more accurate or useful.

R. H. C.

CHICAGO, November 21, 1891.

PREFACE.

THE principal purpose of this book is to place before the bar in easily accessible form the original evidence from a study of which must be solved the new questions to which the act and joint resolution of Congress of March 3, 1891, establishing circuit courts of appeals, give rise. Those enactments are printed, together with the general statutes which govern the appellate jurisdiction of the federal courts, the general practice statutes enacted since the Revised Statutes, and the rules of the Supreme Court. Such comments upon the new statute as the editor has thought it useful to make in advance of any judicial decisions construing it are contained for the most part in chapter 3, treating of the jurisdiction of federal courts, not in the notes under the several sections of the act.

Another purpose of this book is to present in a single volume the more important general statutes, which govern the jurisdiction and practice of federal courts both of original and appellate jurisdiction, and which have been enacted since the publication of the Revised Statutes.

Under the judiciary act of March 3, 1875, as amended in 1887 and 1888 is given a digest of the decisions of the United States Supreme Court and the inferior federal courts, which construe or illustrate that statute, and which have been rendered since its amendment on March 3, 1887.[1] The Supreme Court has delivered as yet only a few such decisions; the decisions on circuit are numerous and somewhat conflicting. The conclusions which the editor has thought it safe to draw are stated in those sections of chapter 3 which treat of the jurisdiction of federal circuit courts.

This book contains the interstate commerce act as amended in 1889 and 1891, the act conferring on federal circuit and district courts jurisdiction of suits against the United States, and other general statutes, under which the editor would gladly have collected the judicial decisions construing them had time permitted. It is possible that this work may yet be done in a future edition.

A sketch of the jurisdiction of the several federal courts and of the judicial power of the United States has been added, as it seemed to the editor that what new matter he had to offer could be best stated as part of a connected whole.

R. H. C.

CHICAGO, May, 1891.

[1] The digest includes 138 United States reports, 43 Federal Reporter, 13 Sawyer's reports and 24 Blatchford's reports.

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CHAPTER 1.

APPELLATE COURTS ACT OF MARCH 3, 1891.

Sections.

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3. Judges who may hold circuit courts of appeals — District judge may sit — Judge not to review his own judgment — Places and times of holding court.
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15. Appeal from the supreme court of a Territory to a circuit court of appeals.

JOINT RESOLUTION, MARCH 3, 1891.

1. Time of convening circuit courts of appeals — Jurisdiction of Supreme and circuit courts prior to July 1, 1891, saved.

AN ACT to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Approved March 3, 1891.[1]

Additional circuit judges to be appointed.] *Be it enacted by the Senate and House of Representatives of the*

[1] Printed from a certified copy procured from the office of the Secretary of State. The text follows the punctuation and capitalization of the certified copy. Omissions supplied are inclosed in brackets.

United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

JUDICIAL CIRCUITS.

For a description of the nine existing circuits see R. S., § 604, which, however, has been modified slightly by subsequent statutes. Colorado is included in the eighth circuit by 19 Stat., 61, June 26, 1876; R. S. Sup., 215. Texas is included in the fifth circuit by 21 Stat., 10, June 11, 1879; R. S. Sup., 490; but this statute appears to have merely re-enacted the provision in R. S., § 604, as to that State.

The States of Washington and Montana are included in the ninth circuit. 25 Stat., 682, § 21, February 22, 1889. The States of North Dakota and South Dakota are included in the eighth circuit. 25 Stat., 682, § 21, February 22, 1889. The State of Idaho is included in the ninth circuit. 26 Stat., 217, § 16, July 3, 1890. The State of Wyoming is included in the eighth circuit. 26 Stat., 225, § 16, July 10, 1890.

POWERS OF A CIRCUIT JUDGE.

He can grant a writ of *ne exeat* in cases in which it might be granted by the circuit court of which he is a judge. R. S., § 717.

He may grant a restraining order or an injunction in cases in which they might be granted by the circuit court of which he is a judge. R. S., §§ 718, 719.

He may hold persons to security of the peace and for good behavior in cases arising under the United States constitution and laws to the same extent as may be done by a State judge in cases within his jurisdiction. R. S., § 727.

He may issue writs of *habeas corpus*. R. S., § 752. But probably only in cases in which the court of which he is a judge could issue the writ. See *In re* Burrus, 136 U. S., 586.

He may admit to bail a person accused of a crime against the United States. R. S., §§ 1015, 1016.

He may issue a search-warrant for goods on which duty has not been paid. R. S., § 3066, as amended by 22 Stat., 49, April 25, 1882.

He may issue search-warrants for counterfeit money and counterfeiting implements. 26 Stat., 743, § 5.

Circuit court of appeals created in each circuit — Organization — Clerk — Marshal — Fees.] § 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and

the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect to the costs and fees in the Supreme Court.

Rules.] The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

For statutory provisions relating to the marshal of the United States Supreme Court, see R. S., §§ 677, 680, 832, 4799.

For statutory provisions relating to the clerk of the United States Supreme Court, see R. S., §§ 677–679, 794–799; 23 Stat., 194, 224, July 7, 1884, provides that the clerk of the Supreme Court shall pay excess of fees over salary and expenses into United States treasury; an act regulating fees and costs, etc., 18 Stat., 333, February 22, 1875.

For statutory provisions relating to fees and costs in the United States Supreme Court, see 19 Stat., 344, March 3, 1877, providing for collecting from the losing party the costs of printing the record. For regulation of costs in the Supreme Court by rule of court, see rule 24 of the Supreme Court, *post*.

Judges who may hold circuit court of appeals.] § 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

District judge may sit—Judge not to review his own judgment.] In case the full court shall not at any time be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

Places and times of holding court.] A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts [.]

The time for holding the first terms of the circuit courts of appeals is extended by the joint resolution of March 3, 1891, printed *post*, to the third Tuesday in June, 1891.

Appellate jurisdiction of circuit courts abolished—Judgments of circuit and district courts to be revised only by the United States Supreme Court or by circuit courts of appeals.] § 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error [or] otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

Direct appeal from trial court to Supreme Court, when allowed.] § 5. That appeals or writs of error may

be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

[1.] In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

[2.] From the final sentences and decrees in prize causes.

[3.] In cases of conviction of a capital or otherwise infamous crime.

[4.] In any case that involves the construction or application of the Constitution of the United States.

[5.] In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

[6.] In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

This statute not to affect appeals from the highest court of a State to the Supreme Court.] Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for a review of such cases.

An examination of this section and the next, in connection with the last sentence of section 14, leaves little doubt that it was the intention of Congress to repeal all statutes providing for a review of the judgments and decrees of federal circuit and district courts by the United States Supreme Court by means of an appeal or a writ of error, except in the classes of cases mentioned in sections 5 and 6, and except possibly in a few exceptional classes of cases in which the United States are a party, *e. g.*, appeals from decisions of circuit courts as to duty charges under the act of June 10, 1890, number 17 in list, *post*, p. 9, and to repeal entirely all statutes providing for an appeal from circuit and district courts by way of certificate of division of opinion between the judges.

The words in section 6, "unless otherwise provided by law," probably refer, (1) to cases in which the decision of a circuit or district court is final, as is the case when a federal circuit court makes an order remanding a cause to a State court; (2) to cases in which the United States Supreme Court exercises appellate revision over the decisions of circuit and district courts by the writ of *habeas corpus*, *mandamus* or prohibition, or by any other method than by appeal or writ of error or certificate of division of opinion between the judges holding the court below; and (3) possibly to exceptional cases, such as an appeal under the revenue law of June 10, 1890, before mentioned.

It is noticeable that section 14, while it expressly repeals all statutes and parts of statutes governing appeals or writs of error so far as they are inconsistent with sections 5 and 6, yet makes no mention of existing statutes providing for the exercise of appellate jurisdiction by the United States Supreme Court over inferior federal courts by means of the writ of *habeas corpus*, *mandamus*, prohibition or *certiorari*, or by any other means than an appeal or a writ of error. Even appellate review by means of a certifi-

cate of division of opinion is not expressly mentioned in section 14. The language employed in section 4, abolishing the appellate jurisdiction of circuit courts, is more comprehensive than that employed in section 14, and suggests that the language employed in the latter section was not intended by Congress to deprive the Supreme Court of all the appellate jurisdiction over circuit and district courts conferred upon it by prior statutes. It is difficult to believe on the one hand that Congress intended by the act of March 3, 1891, to curtail the power of the Supreme Court to issue a writ of *habeas corpus*, or on the other hand that it meant to allow the clear cut distinctions established by sections 5 and 6 of that act to be obscured by appeals by means of a certificate of division of opinion allowed on principles different from those there established. It seems more reasonable to suppose that Congress intended to pursue a middle course. There is no difficulty in including appeals by certificate of division of opinion under the general term, appeals, in view of the recent decision of the Supreme Court holding that a writ of *mandamus* does not lie from that court to a circuit court to review an order of the latter remanding a cause to a State court, because Congress, by expressly abolishing an appellate review of such an order by appeal or writ of error, forbade by implication the appellate review of such an order by any proceeding. *In re* Pennsylvania Company, 137 U. S., 451.

The principal statutes which provide for an appellate review of the decisions of circuit and district courts by the United States Supreme Court by error, appeal or certificate of division of opinion, and which are not specifically repealed by the act of March 3, 1891, are the following:

1. R. S., § 651. Whenever any question occurs on the trial or hearing of any criminal proceeding before any circuit court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any cases where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment.

2. R. S., § 652. When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record.

3. R. S., § 692. An appeal shall be allowed to the Supreme Court from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity, and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000, and the Supreme Court is required to receive, hear, and determine such appeals.

4. R. S., § 693. Any final judgment or decree, in any civil suit or proceed-

ing before a circuit court which was held at the time by a circuit justice and a circuit judge or a district judge, or by the circuit judge and a district judge, wherein the said judges certify as provided by law, that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed and affirmed or reversed or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and *supersedeas*.

5. R. S., § 695. An appeal shall be allowed to the Supreme Court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000; and shall be allowed, without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance. And the Supreme Court shall receive, hear, and determine such appeals and shall always be open for the entry thereof.

6. R. S., § 697. When any question occurs on the hearing or trial of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order.

7. R. S., § 699. A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute:

First. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, or of the Supreme Court of the District of Columbia, or of any Territory, in any case touching patent-rights or copyrights.

Second. Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by the United States for the enforcement of any revenue law thereof.

Third. Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action against any officer of the revenue for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the treasury.

Fourth. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States.

Fifth. Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by any person on account of injury to his person or property by an act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, title "Civil Rights."

8. R. S., § 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of *habeas corpus*

or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard: 1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States. 2. In the case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. § 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section. As amended by 23 Stat., 437.

9. An act to protect all citizens in their civil and legal rights. March 1, 1875, R. S. Sup., 148; 18 Stat., 335. Section 5 is as follows: "That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court." By section 5 of the amendatory acts of March 3, 1887, and August 13, 1889, it was provided that nothing therein should repeal or affect this statute. Sections 1 and 2 of this statute are unconstitutional so far as they purport to be operative within the States of the Union. The Civil Rights Cases, 109 U. S., 3.

10. An act restricting the refunding of custom duties, etc. March 3, 1875, R. S. Sup., 172; 18 Stat., 469. Section 4 contains a proviso as follows: "That in all cases where the Secretary of the Treasury shall so request the Attorney-General shall take an appeal to the Supreme Court."

11. An act to authorize the registration of trade-marks and protect the same. March 3, 1881, R. S. Sup., 606, 21 Stat., 502. Section 7 provides: "And courts of the United States shall have original and appellate jurisdiction in such cases [actions on the case for damages and equity suits for an injunction and account under the act] without regard to the amount in controversy."

12. An act to reduce internal-revenue taxation, etc. March 3, 1883, 22 Stat., 488. Provides, amending Revised Statutes, section 2493, for appeals and writs of error from judgments of forfeiture by district and circuit courts in proceedings under the statute as in other cases of municipal seizure.

13. An act to regulate commerce, as amended February 4, 1887, 24 Stat., 379; amendment 25 Stat., 855, March 2, 1889. Printed in full *post*. Section 16 provides for an appeal to the Supreme Court from a judgment of a federal circuit court enforcing an order of the interstate commerce commission when the value involved is $2,000 or more. In one class of cases the appeal must be taken within twenty days after judgment.

14. An act to provide for the bringing of suits against the government of the United States. March 3, 1887, 24 Stat., 505. Printed in full *post*. See sections 4, 9, providing for an appeal by the United States from an adverse decision of a federal circuit or district court to the United States Supreme

Court, without regard to the amount in controversy, and for an appeal by the plaintiff when $3,000 is involved.

15. An act to abolish circuit court powers of certain district courts of the United States and to provide for writs of error in capital cases. Feb. 6, 1889, 25 Stat., 655. Printed in full *post.*

16. An act to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the question of the jurisdiction of the courts below. Feb. 25, 1889, 25 Stat., 693. Printed in full *post.*

17. An act to simplify the laws in relation to the collection of the revenues. June 10, 1890; 26 Stat., 131, 138, § 15. Provides for an appeal from a decision of a federal circuit court under said statute as to duty charges to the United States Supreme Court at the option of the United States in any case, and in the discretion of the circuit court upon application of the importer, the appeal to be taken within thirty days after the decision of the circuit court.

18. For prior statutes allowing appeals from Territorial supreme courts to the United States Supreme Court, see Ch. 2, Statutes Nos. 1, 8, *post.*

19. For prior statutes allowing appeals from the United States court in the Indian Territory to the United States Supreme Court, see notes under § 13, *post.*

20. For examples of the allowance of appeals to the United States Supreme Court under special statutes, see 24 Stat., 335, August 5, 1886, to provide for protecting the interests of the United States in the Potomac River Flats, etc.; 25 Stat., 400, 411, condemnation proceedings; 26 Stat., 24, March 19, 1890, appeal from the court of claims.

The appellate jurisdiction of the United States Supreme Court, exercised by means of special writs, is governed chiefly by one constitutional and several statutory provisions, as follows:

1. Const., art. 3, § 2, clause 2. In all the other cases before mentioned [*i. e.*, cases not of original jurisdiction] the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

1. R. S., § 688. The Supreme Court shall have power to issue writs of prohibition in[to] the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party.

2. R. S., § 716. The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias.* They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

3. R. S., § 717. Writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satis-

factory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

4. R. S., § 719. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. . .

5. R. S., § 751. The Supreme Court and the circuit and district courts shall have power to issue writs of *habeas corpus*.

6. R. S., § 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

AS TO CLAUSE 1. As to the practice upon an appeal or writ of error from a circuit or district court to the Supreme Court in a case in which the jurisdiction of the lower court is in issue, see, An act to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the jurisdiction of the courts below, approved February 25, 1889, printed in full *post;* also Rule 32 of the United States Supreme Court, *post*, regulating the practice under the act of February 25, 1889. The latter act only provides for an appellate review of *final* judgments and decrees involving the jurisdiction of the court below. The language employed in section 5 is quite different from that used in the act of 1889, and is consistent with the interpretation that an appeal may be taken from a judgment of a circuit or district court either affirming or disaffirming its jurisdiction, although in the former case the judgment may not be final in the sense of disposing of the controversy. If this is the true interpretation, the suit would continue in the court below for a trial on the merits after a judgment of the Supreme Court sustaining the jurisdiction, and after judgment on the merits the case might be taken to the circuit court of appeals or a second time to the Supreme Court under other clauses of section 5 than the first.

AS TO CLAUSE 3. As to the practice upon writs of error from the Supreme Court in cases of a conviction of a capital or otherwise infamous crime, see, An act to abolish circuit court powers of certain district courts of the United States, and to provide for writs of error in capital cases, etc., in force February 6, 1889, *post*. See, also, Rule 35 of the United States Supreme Court, *post*, regulating the practice under the act of February 6, 1889.

AS TO CLAUSE 5. A case, involving the construction of an act of Congress, is not, on that ground, included in clause 5.

Jurisdiction of circuit courts of appeals—When final.] § 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision [s] in the district court [s] and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless other-

wise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases.

Revision of judgment of circuit court of appeals by Supreme Court.] Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

See remarks under section 5.

APPEALS TO THE SUPREME COURT. Cases at law or in equity to recover for, or restrain, infringement of a copyright or a trade-mark, not being enumerated among the cases in which the jurisdiction of circuit courts of appeals are final, may be taken to the Supreme Court, probably, as of right, when the value in controversy exceeds $1,000 exclusive of costs.

Appeal to circuit court of appeals from interlocutory decree granting or continuing an injunction.] § 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal

may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, That the appeals must be taken within thirty days from the entry of such order or decree; and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

The allowance of an appeal from an interlocutory order is a new feature in the practice of federal courts. The act of February 25, 1889, *post*, providing for a writ of error or an appeal to the United States Supreme Court in all cases involving the question of the jurisdiction of the courts below, only provided for the appellate review of a final judgment or decree.

Allowance to judge holding court away from his residence.] § 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

Marshal of district to provide court-rooms and pay court expenses.] § 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided, however*, That in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

Cases reviewed by the Supreme Court or by a circuit court of appeals to be remanded to the proper circuit or district court.] § 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ or [of] error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by

the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

Appeal to circuit court of appeals to be taken within six months or less.] § 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided, however*, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals.

See remarks in chapter 3.

Practice as to appeals.] And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the condition of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

R. S., §§ 997-1013, relate to practice on error and appeal.

See Rules of the United States Supreme Court, *post*.

See act of February 16, 1875, *post*, regulating admiralty practice on the instance side of the court.

Power of circuit court of appeals to issue writs.] § 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

Section 716 of the Revised Statutes is as follows: The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Quære. Can a circuit court of appeals issue a writ of *habeas corpus?* By R. S., §§ 751, 752, the Supreme Court, the circuit and district courts and the several justices and judges of said courts are given power to issue the writ. It has not been found necessary heretofore to rest the power to issue writs of *habeas corpus* upon § 716 of the Revised Statutes. Section 14 of the judiciary act of 1789, from which R. S., § 716, was drawn, was as follows:

§ 14. *And be it further enacted,* That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided,* that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Appeals from federal court in Indian Territory.] § 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

An act to establish a United States court in the Indian Territory, and for other purposes, approved March 1, 1889 (25 Stat., 783), § 6, provides for the review by the United States Supreme Court by writ of error or appeal of the final decisions of the United States court in the Indian Territory when the value in dispute exceeded $1,000.

An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes, approved May 2, 1890 (26 Stat., 81), § 42, is as follows: "That appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act."

Repeal.] § 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

For remarks upon the last sentence of this section, see notes under section 5, *ante.*

Section 691 of the Revised Statutes, repealed by this section, provided for a writ of error from the United States Supreme Court to circuit courts to review their final judgments when the matter in dispute exceeded $2,000.

Section 3 of the act of February 16, 1875, repealed by this section, provided that, in order that judgments and decree of circuit courts might be reviewed by the Supreme Court, the value in dispute must be $5,000 where before it had been $2,000. The unrepealed part of the act of February 16, 1875, is printed in full *post*.

Appeal from supreme court of Territory to circuit court of appeals.] § 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

Approved March 3, 1891.

It will be observed that the scope of the appellate jurisdiction of a circuit court of appeals to review the judgments of a supreme court of a Territory is less extensive than its power over the judgments of a circuit or district court of the United States.

An act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories, approved March 3, 1885, *post*, is modified so far as inconsistent with this section.

JOINT RESOLUTION, MARCH 3, 1891.

JOINT RESOLUTION to provide for the organization of the circuit courts of appeals. Approved March 3, 1891.[1]

Time of convening of circuit courts of appeals.] *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first meetings of the several circuit courts of appeals mentioned in the act of Congress passed at this present session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct:

Jurisdiction of Supreme and circuit courts prior to July 1, 1891, saved.] *And be it further resolved*, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno domini, eighteen hundred and ninety-one.

Approved March 3, 1891.

See the last sentence of section 3 of the preceding act, to correct which this resolution was passed.

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[1] Printed from a certified copy procured from the office of the Secretary of State. The text follows the punctuation and capitalization of the certified copy.

CHAPTER 2.

IMPORTANT GENERAL STATUTES, GOVERNING THE JURISDICTION AND PRACTICE OF THE FEDERAL COURTS, ENACTED AFTER THE REVISED STATUTES.

Number.

1. An act concerning the practice in Territorial courts and appeals therefrom. April 7, 1874.
2. An act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes. February 16, 1875.
3. An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes. March 3, 1875. As amended in 1887 and 1888.
4. An act to provide for the appointment of commissioners for taking affidavits, etc., for the courts of the United States. August 15, 1876.
5. An act to make persons charged with crimes competent witnesses in the United States and Territorial courts. March 16, 1878.
6. An act making appropriations, etc. (clerk when not to be receiver or master). March 3, 1879.
7. An act regulating fees and the practice in extradition cases. August 3, 1882.
8. An act regulating the appeals from the Supreme Court of the District of Columbia and the supreme courts of the several Territories. March 3, 1885.
9. An act to regulate commerce. February 4, 1887. As amended March 2, 1889, August 8, 1890, and February 10, 1891.
10. An act to provide for the bringing of suits against the Government of the United States. March 3, 1887.
11. An act to authorize condemnation of land for sites of public buildings and for other purposes. August 1, 1888.
12. An act to regulate the liens of judgments and decrees of the courts of the United States. August 1, 1888.
13. An act to correct the enrollment of an act approved March 3, 1887, entitled "An act to amend sections 1, 2, 3 and 10 of an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes. Approved March 3, 1875." August 13, 1888.
14. An act to abolish the circuit court powers of certain district courts of the United States and to provide for writs of error in capital cases and for other purposes. February 6, 1889.
15. An act to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the question of the jurisdiction of the courts below. February 25, 1889.

No. 1.

AN ACT concerning the practice in Territorial courts, and appeals therefrom. Approved April 7, 1874. 18 Stat., 27.

Preamble.] Whereas, by the organic acts establishing several of the Territories of the United States, it is provided that certain courts thereof shall have common law and chancery jurisdiction, and doubts have been entertained whether said jurisdictions must be exercised separately, or whether they may be exercised together in the same proceeding, and whether the codes and rules of practice adopted in said Territories which have authorized a mingling of said jurisdictions in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, are repugnant to the said organic acts respectively: Therefore,

Be it enacted, etc.

In Territorial courts, law and chancery jurisdiction need not be exercised separately.] SECTION 1. That it shall not be necessary in any of the courts of the several Territories of the United States to exercise separately the common law and chancery jurisdictions vested in said courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby, validated and confirmed:

Right of jury trial preserved.] *Provided*, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

Appeal and writ of error to Supreme Court.] § 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe:

Proceedings on appeal.] *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate

proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal:

And provided further, That the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of the parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed.

No. 2.

AN ACT to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes. Approved February 16, 1875. In force May 1, 1875. 18 Stat., 315.

Be it enacted, etc.

In admiralty, court to find facts and law separately.] [SECTION 1.] That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately.

Jury with consent of parties.] And finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law.

And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law.

Review by Supreme Court.] The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.

This section probably governs appeals from a circuit court to a circuit court of appeals in an admiralty case on the instance-side of the court.

A finding of facts in an admiralty case under the act of February 16, 1875, has the same effect as a special verdict in an action at law. The Maggie J. Smith, 123 U. S., 349, 352.

On appeal to United States Supreme Court in admiralty suit brought in federal circuit court, the finding of facts by the circuit court is conclusive on the Supreme Court. Hostetter *v.* Park, 137 U. S., 30.

Jury in patent cause in equity.] § 2. That said courts, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five nor more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the Supreme Court, and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient;

And the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.

Section 3 of this act was repealed by section 14 of the act of March 3, 1891 (*ante*, p. 1). The repealed section was as follows:

§ 3. That whenever, by the laws now in force, it is required that the matter in dispute shall exceed the sum or value of two thousand dollars, exclusive of costs, in order that the judgments and decrees of the circuit courts of the United States may be re-examined in the Supreme Court, such judgments and decrees hereafter rendered shall not be re-examined in the Supreme court unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs.

§ 4. That this act shall take effect on the first day of May, eighteen hundred and seventy-five.

No. 3.

AN ACT to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes. Approved March 3, 1875. 18 Stat., 470.

NOTE.—The amendments to this statute made by the act of August 13, 1888 (25 Stat., 433), correcting the enrollment of the amendatory act of March 3, 1887 (24 Stat., 552), are inserted at their proper places, and the fact of amendment is noted at the end of each amended section.

So much of the amendatory of March 3, 1887, as re-enacted August 13, 1888, as does not amend specific sections of the act of March 3, 1875 — namely, all of the act of 1887 except section 1 — is printed, *post*, as Statute No. 13.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of an act entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

Original jurisdiction of circuit courts.] That the circuit courts of the United States shall have original cognizance,

concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, [1] where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, [2] or in which controversy the United States are plaintiffs or petitioners, [3] or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, [4] or a controversy between citizens of the same State claiming lands under grants of different States, [5] or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, [6] and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.

Place of suit.] But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;

Suit by assignee.] Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

As amended by act of August 13, 1888. 25 Stat., 433.

The last sentence of this section, conferring on circuit courts appellate jurisdiction over district courts, is repealed by the act of March 3, 1891, § 4, *ante*.

ORIGINAL JURISDICTION GENERALLY.

The eleventh section of the judiciary act of 1789, which regulated the original jurisdiction of federal circuit courts and which is the forerunner of the first section of the judiciary act of 1875, as amended in 1887 and 1888, is limited by the forerunner of Revised Statutes,

ORIGINAL JURISDICTION GENERALLY — *continued.*

section 716, so as not to include original *mandamus* suits although between persons of diverse citizenship. *Arguendo* Rosenbaum *v.* Bauer (1887), 120 U. S., 450, which overruled in effect New Orleans, etc., R. Co. *v.* Mississippi, 112 U. S., 12, and Railroad Co. *v.* Mississippi, 102 U. S., 135.

A circuit court of the United States has no jurisdiction to compel a postmaster, by *mandamus*, to transmit mail matter at a lower rate of postage than that charged. United States *v.* Pearson, 24 Blatch., 453.

New remedies afforded by State statutes will be applied, and new rights given, enforced in the national courts. *Held*, accordingly, that an action at law, to enforce the individual liability of stockholders, under provisions of the Civil Code of California, may be maintained in a federal circuit court held in that State. Borland *v.* Haven, 13 Sawyer, 551.

The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract, if genuine, and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract, within the meaning of the acts of Congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed when the question of jurisdiction is raised. Sharon *v.* Terry, 13 Sawyer, 387; Same Case, 36 F. R., 337.

Where a State court refuses to permit its receiver either to sue in a federal court or to be made a party defendant, the jurisdiction of the federal court fails. Porter *v.* Sabin, 36 F. R., 475.

The facts that a partnership has become insolvent, and passed into the hands of a receiver appointed by a State court of another State, before the commencement of an action against it in the federal court of the district of the residence of one of its members, and that plaintiff's claim has been presented to the receiver, who still retains the partnership affairs in his hands unsettled, are no bar to the action. Rawitzer *v.* Wyatt, 40 F. R., 609.

In Nevada, counties are liable to be sued in the State courts, the same as "natural persons." *Held*, also, that they are liable to be sued in the courts of the United States. Vincent *v.* Lincoln Co., 30 F. R., 749.

Where a statute of a State provided that in the case of fraudulent assignments a court of competent jurisdiction is authorized to declare the assignment void, although the assignee is not shown to have notice of the fraud, the equity courts of the United States having jurisdiction can enforce rights under such statute. Jaffrey *v.* Brown, 29 F. R., 476, followed. Bernheim *v.* Birnbaum, 30 F. R., 885.

ORIGINAL JURISDICTION GENERALLY — *continued.*

The circuit court has not original jurisdiction of proceedings to limit the liability of ship-owners by virtue of admiralty rule 58, which provides that all the rules and regulations for proceedings in cases where ship-owners desire the benefit of the limitation of liability "shall apply to the circuit courts of the United States, where such cases are or shall be pending in said courts upon appeal from the district courts," or otherwise. The proceedings must originate in the district court. *In re* Petition of Lord, 31 F. R., 416.

Pending proceedings in a State court under an assignment for the benefit of creditors, a creditor who was not a party to such proceedings, and who was a non-resident of the State in which the assignment was made, brought suit in the United States circuit court to determine the validity of a deed of trust made prior to the assignment, and covering a large amount of the assets assigned. The assignee had entered upon the duties of his trust, but had taken no steps to contest the deed. *Held* that, as the question of the validity of the deed was one which was so entirely separate and distinct from those questions involved in the general proceedings that it could properly be eliminated therefrom without prejudice to such proceedings, it was one which the United States court had jurisdiction to determine. Gould *v.* Mullanphy Planing-Mill Co., 32 F. R., 181.

The attachment of a debt in New Jersey by a resident of New York, after the execution in New York, by the owner of the debt, of an assignment for the benefit of creditors, will not prevent the federal courts from entertaining a suit by the assignee for the recovery of the debt. Halsted *v.* Straus, 32 F. R., 279.

A State statute vesting in the board of supervisors of each county "exclusive power to adjust all claims against their respective counties" is no bar to a prosecution for a tort in a federal court. May *v.* Saginaw Co., 32 F. R., 629.

An action will lie against a county for the infringement of a patent. *Id.*

Whenever it is intended to proceed against the sureties on an administrator's bond, the United States circuit court has original jurisdiction in equity to compel an accounting by the administrator without a preliminary accounting before the probate court. Prince *v.* Towns, 33 F. R., 161.

Plaintiffs alleged that their property had been seized under color of a State law which was alleged to be void as against the federal constitution. *Held,* on demurrer, that a federal question was sufficiently presented without formally alleging that the circumstances of the arrest were such as to call forth the operation of the State law. Booth *v.* Lloyd, 33 F. R., 593.

A suit to annul a will as a muniment of title, and so as to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity; and if by the law obtaining in the State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States,

ORIGINAL JURISDICTION GENERALLY — *continued.*

if the parties are citizens of different States, and the amount in controversy is sufficient to give the circuit court of the United States jurisdiction. Everhart *v.* Everhart, 34 F. R., 82.

The fact that a citizen of another State is selected as administrator for the purpose of conferring on the United States circuit court jurisdiction of an action to be brought by him does not defeat that jurisdiction. Goff's Adm'r *v.* Norfolk, etc., Co., 36 F. R., 299.

When defendant, in suit to quiet title to unoccupied land, is not in possession, complainant has not a plain, complete and adequate remedy at law, in which case suits in equity are forbidden by Revised Statutes, section 723, but the federal courts may administer the equitable remedy given by such Michigan statute. Grand Rapids, etc., Co. *v.* Sparrow, 36 F. R., 210.

Federal courts have jurisdiction to relieve against a title fraudulently obtained by proceedings in a State court by enjoining the assertion of the fraudulent title. Robb *v.* Vos, 36 F. R., 132.

The motive with which a person purchases property or a claim has nothing to do with his right to maintain an action thereon in the national courts; and so it does not affect the jurisdiction of said courts if the purchase is made with the expressed intention of suing therein. Neal *v.* Foster, 36 F. R., 29.

Where entry beneath the surface on mining land is claimed to be made under the mining laws of the United States, and the right to enter turns upon the construction to be given to such laws, the case is within the jurisdiction of the United States circuit court. Cheeseman *v.* Shreeve, 37 F. R., 36.

The federal courts will take equity jurisdiction of a bill by non-resident heirs at law against resident heirs to compel an accounting of the property of their intestate in the hands of the defendants, and for a distribution of the estate, notwithstanding the remedy of complainants under the probate law of the State, when the bill alleges facts evoking the exercise of the powers of a court of chancery, such as that there has been no administration after the lapse of five years, that defendants have wrongfully appropriated the whole estate to their use, traded and speculated upon it, changing the original form of some of the property, made profits thereon, and been guilty of concealment, rendering a discovery and accounting necessary. Rich *v.* Bray, 37 F. R., 273.

The federal courts have jurisdiction of an action by a steamboat company to recover damages from a railroad company for obstructing a navigable river of the United States by building a bridge across it, regardless of the citizenship of the parties. Sunflower River Packet Co. *v.* Georgia Pac. R. Co., 39 F. R., 229.

If a legislature of a State permits a county to contract and issue obligations as evidences of indebtedness to citizens of other States, such legislature cannot prevent such citizens from bringing suits in a federal court in the State of the county by a law which provides

ORIGINAL JURISDICTION GENERALLY — *continued.*

that counties cannot be sued, for the laws of the State permit the counties to create, on behalf of the citizens of other States, a property right as against the counties, and this gives the right to such citizens to sue the counties in the federal courts. And such right is one which is beyond the control of any legislative action of the State, and can be regulated alone by the constitution and laws of the United States. Hoover *v.* Crawford County, 39 F. R., 1.

The federal courts have jurisdiction of suits involving the validity of a tax imposed by a State, alleged to be in violation of the United States constitution, without regard to the citizenship of the parties thereto. United States Exp. Co. *v.* Allen, 39 F. R., 712.

In an action to restrain defendants from using bottles and labels in imitation of those of the plaintiff, where the patent for the design of such bottles has expired, the question whether defendants are using the same in good faith, in which case their acts would be lawful, or for the purpose of misleading the public to believe that they are selling the article made by plaintiff, in which case the expiration of the patent would be no defense, does not arise under the laws of the United States so as to give the federal courts jurisdiction. Societe Anonyme De La Distillerie De La Liqueur Benedictine De L'Abbaye De Fecamp *v.* Cook, 40 F. R., 382.

Under act of Congress, 1875, giving circuit courts jurisdiction in all cases "arising under the constitution or laws of the United States," such courts have jurisdiction of a bill for an injunction to restrain a railroad company from extending its road across land belonging to the United States, and to which the complainant claims to have an equitable title as a pre-emptor, where the question in dispute is whether complainant has a right to the land under the laws of the United States. Jones *v.* Florida C. & P. R. Co., 41 F. R., 70.

Under the act of June 7, 1878, repealing the bankrupt law, and the act of March 3, 1887, amending the act of 1875, a circuit court has jurisdiction of a suit by an assignee in bankruptcy to prevent a person from establishing on the bankrupt's property, by proceedings in a State court, the lien of a fraudulent judgment obtained in 1869. Lehman *v.* La Forge, 42 F. R., 493.

A federal court has jurisdiction of a suit to set aside its former decree for being fraudulently obtained, although by reason of present citizenship a purely original bill between the parties could not be maintained, as such a suit is but a continuation of the former controversy. Foster *v.* Mansfield, C. & L. M. R. Co., 36 F. R., 627.

An original bill and a cross-bill thereto constitute but one cause; and when a circuit court has jurisdiction of the former by reason of the citizenship of the parties thereto, it has jurisdiction of the latter without reference to such citizenship. First Nat. Bank of Salem *v.* Salem Capital Flour-Mills Co., 31 F. R., 580. *Contra*, Vannerson *v.* Leverett, 31 F. R., 376.

Defendant in a suit involving less than $2,000 was served with summons February 2, 1887, by an unauthorized person. He appeared gener-

ORIGINAL JURISDICTION GENERALLY — *continued.*

ally on February 23, 1887, and subsequently answered. *Held*, that the appearance cured the defect in service and gave the court jurisdiction, and therefore the case was not affected by act of March 3, 1887, increasing the jurisdictional amount to $2,000. Platt *v.* Manning, 34 F. R., 817.

Under the provisions of the act of March 3, 1887, an action may be maintained in the circuit court of the United States against a citizen of another State. Short *v.* Chicago, M. & St. P. R'y, 33 F. R., 114.

Where a writ of replevin was inadvertently issued in a case of which the court had no jurisdiction, and the property was turned over to the plaintiff pursuant to a statute of the State, *held*, that the court was not authorized to enter a judgment for a return of the property or to assess its value; its power is limited to dismissing the writ. Burdett *v.* Doty, 38 F. R., 491.

AMOUNT IN CONTROVERSY.

For patent and copyright suits brought without regard to the amount in controversy, see head, PATENT AND COPYRIGHT SUITS, *infra.*

Bill by some creditors of insolvent corporation on behalf of all against the corporation and its stockholders to compel the latter to pay their unpaid stock subscriptions, where claim of original plaintiff amounts to more than $2,000, is within the jurisdiction of a federal circuit court. Handley *v.* Stutz, 137 U. S., 366.

Under the act of March 3, 1887, an action may be maintained in the United States circuit courts where the matter in dispute exceeds, exclusive of interest and costs, the value of $2,000, although it is made up of distinct demands of less value than $2,000, and although the plaintiff may have acquired such demands by assignment. Bernheim *v.* Birnbaum, 30 F. R., 885.

Under the act of March 4, 1887, the circuit court of the United States has not jurisdiction in a controversy between citizens of different States, if the sum or value of the matter in dispute does not exceed $2,000, excluding from the computation any interest which may have accrued up to date of suit. Moore *v.* Town Council of Edgefield, 32 F. R., 498.

In an action for damages to property by a railroad company occupying a street the *ad damnum* of the writ and declaration was laid at $1,500 in ignorance of the new act of Congress of March 3, 1887, increasing the minimum limit of the jurisdiction to $2,000; but, on motion to dismiss, the plaintiff asked leave to amend by increasing the *ad damnum*. *Held*, that the amendment should be allowed, since it did not satisfactorily appear from the nature of the case, and the circumstances shown, that the damages were not in fact larger than the original claim. It is only when the court can plainly see that its jurisdiction is being fraudulently invoked that it will deny the amendment or dismiss the cause. Davis *v.* Kansas City, etc., R. Co., 32 F. R., 863.

Where a bill for the specific performance of a contract for the sale of land is silent respecting the value of the land in controversy, except

AMOUNT IN CONTROVERSY — *continued.*

that, in the contract sought to be enforced, its price or value is fixed at $1,000, an amendment alleging that the present value of the land is $3,000 brings the controversy, as to amount, within the jurisdictional limits of the circuit court, as fixed by the act of March 3, 1887. Johnston *v.* Trippe, 33 F. R., 530.

Where the representatives of a deceased intestate bring suit against an administrator under one title and for a common undivided interest, the United States circuit court will, in the absence of any other valid objection, have jurisdiction, although the amount, which on division would come to each representative, may be less than the jurisdictional minimum. Prince *v.* Towns, 33 F. R., 161.

A declaration filed in the circuit court in Illinois averring that the plaintiff is a citizen of Ohio, and containing three counts,— one upon a promissory note for $875, one for money had and received, $875, and one for work and labor, $875,— is sufficient upon demurrer to give that court jurisdiction, as the aggregate of the sums alleged to be in controversy exceeds the sum of $2,000. Armstrong *v.* Ettlesohn, 36 F. R., 209.

Revised Statutes, section 968, provides that where a plaintiff in a circuit court recovers less than $500 he shall not recover costs, but at the discretion of the court may be adjudged to pay costs. This section formed a part of the judiciary act, which fixed the jurisdictional amount at $500. Act of March 3, 1887, fixed the minimum limit of the amount in dispute, necessary to give jurisdiction, at $2,000, but made no reference to section 968. *Held,* that the section was not amended by the act of 1887. Eastman *v.* Sherry, 37 F. R., 844, followed. Johnson *v.* Watkins, 40 F. R., 187.

The theory of a bill being that a portion of the heirs entitled to distribution may maintain the action for their respective proportions without joining others, in order to give jurisdiction to the circuit court the interest of each, independent of others, must amount to the sum of $2,000; and an allegation in the bill that "the amount of (the property in controversy) is unknown to said complainants, but much more than $2,000, over and above all just debts and funeral expenses," is not sufficient to confer jurisdiction. Rich *v.* Bray, 37 F. R., 273.

Its cash price at a forced sale is not the proper criterion for ascertaining the value of property in controversy, on the question of the jurisdiction of the federal courts, but the true rule is, What could it be sold for in the ordinary course of business? Berthold *v.* Hoskins, 38 F. R., 772.

On complaint of false imprisonment, with damages laid at $10,000, it cannot be said that the amount in controversy is less than $2,000, and not within the jurisdiction of the circuit court, though plaintiff was deprived of his liberty for only fifteen minutes, for refusal to pay a license demanded of him as a stove-range agent. Hynes *v.* Briggs, 41 F. R., 468.

AMOUNT IN CONTROVERSY — *continued.*

Under 24 Stat., 552, limiting the jurisdiction of circuit courts to suits in which the matter in dispute exceeds $2,000, a circuit court has jurisdiction of a bill brought by a stockholder for the benefit of the corporation and any other stockholders who may choose to come in, to restrain the directors from paying out assets of the corporation to the amount of $100,000, though the complainant holds less than $1,000 worth of stock, the matter in dispute in such case being the wrong done the corporation. Hill *v.* Glasgow R. Co., 41 F. R., 610.

Under the act of 1875, as amended in 1887 and 1888, in a suit on county bonds and the interest coupons attached thereto, the coupons constitute "interest" within the meaning of the clause of the statute providing that the United States circuit courts shall have jurisdiction in certain cases where the amount in dispute exceeds $2,000, exclusive of interest and costs. Howard *v.* Bates County, 45 F. R., 276.

PATENT AND COPYRIGHT SUITS.

Under the act of Congress of March 3, 1887 (§ 1), providing that suits in the federal circuit courts shall be brought in the district where the defendant resides, except when the citizenship of the parties is the jurisdictional fact, a bill to restrain the infringement of a patent filed in Missouri against a citizen of Indiana cannot be maintained. Reinstadler *v.* Reeves, 33 F. R., 308.

A bill for infringement of a patent in the circuit court for the southern district of New York by a citizen of that State alleged that the defendant was a corporation of Connecticut doing business in the district. *Held*, on demurrer to the bill, for which a special appearance only had been entered, that the court had no jurisdiction; the defendant, under the act of Congress of March 3, 1887, not being liable to suit outside of the district of which it was an inhabitant, except where it waives its objection, or where the jurisdiction of the circuit court is invoked solely on the ground of diverse citizenship. Halstead *v.* Manning, Bowman & Co., 34 F. R., 565.

A circuit court sitting in Illinois has no jurisdiction of a suit for the infringement of letters patent brought by a corporation of that State against a corporation of Connecticut, having its principal office in Massachusetts and doing business in Illinois; a corporation, under the act of 1887, being an inhabitant of the place where it has its principal place of business, where its corporate offices and records are kept, and its corporate meetings are held, and there being no statute in Illinois making it a condition of foreign corporations doing business in the State that they appoint agents upon whom process may be served. Gormully & Jeffrey Manuf. Co. *v.* Pope Manuf. Co., 34 F. R., 818.

Neither Revised Statutes, section 711, vesting in the United States courts exclusive jurisdiction of patent and copyright cases, nor section 699, providing for appeals and writs of error in such cases, without

PATENT AND COPYRIGHT SUITS — *continued.*

regard to the sum in dispute, was repealed by act of March 3, 1875, and neither can therefore be repealed by act of March 3, 1887, which only purports to amend the former act. Both acts merely refer to those cases where the State and federal courts have concurrent jurisdiction. Miller-Magee Co. *v.* Carpenter, 34 F. R., 433.

In view of the act of July 8, 1870, section 106, conferring on the circuit courts jurisdiction of all actions arising under the copyright laws, whether civil or penal in their nature, those courts, under Revised Statutes, section 629, clause 9, giving them jurisdiction of all suits arising under the copyright laws, have jurisdiction of *qui tam* actions for penalties imposed by section 4963 for violations of the law relating to copyright, though by section 563 the district courts have jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. Taft *v.* Stephens Lith. & Eng. Co. (March 20, 1889), 37 F. R., 726.

Under section 1 of the act of 1875, as amended in 1887 and 1888, which provides that no civil action shall be brought against any person in any district except that in which he is an inhabitant, a suit cannot be maintained in the district of New Jersey against the commissioner of patents, whose official residence is the District of Columbia. Illingworth *v.* Atha, 42 F. R., 141.

SUITS BY THE UNITED STATES, CIVIL AND CRIMINAL.

The limitation as to amount in controversy, necessary to give the circuit court jurisdiction, fixed by section 1 of the act of March 3, 1887, does not apply to suits in which the United States is plaintiff or petitioner. United States *v.* Shaw, 39 F. R., 433. *Contra*, United States *v.* Huffmaster, 13 Sawyer, 283; S. C., 35 F. R., 83.

The old law embraced in section 629, Revised Statutes, gave jurisdiction of all suits at common law and in equity where the United States are plaintiffs or petitioners, and it also contained an independent special clause, giving jurisdiction of all suits arising under the revenue, internal revenue, or postal laws. The act of March 3, 1887, conferred jurisdiction of all suits at common law or in equity where the United States are plaintiffs or petitioners, without reference to said special subjects. *Held*, that the latter provision does not repeal by implication the grant of jurisdiction over the special subjects mentioned in the dependent clauses of the original statute. United States *v.* Shaw, 39 F. R., 433.

The receiver of a national bank in process of liquidation, having received his appointment from the comptroller of the currency under the national banking laws, is an officer of the United States, and as such may sue in the circuit court, without regard to citizenship or the amount involved, under Revised Statutes, section 629, clause 3, conferring upon that court jurisdiction "of all suits at common law where the United States, or any officer thereof, suing under authority of any acts of Congress, are plaintiffs." Armstrong *v.* Ettlesohn, 36 F. R., 209.

SUITS BY THE UNITED STATES—*continued.*

Clause 4, section 629, Revised Statutes, was not repealed by the act of March 3, 1875, or by the act of March 3, 1887, defining the jurisdiction of the circuit courts; and these courts have jurisdiction in suits arising under revenue laws, although the amount in dispute is less than $2,000. Ames *v.* Hager, 13 Sawyer, 473; S. C., 36 F. R., 129.

Forging or unlawfully tampering with the tally-papers or other returns which show, in addition to the number of votes cast for a member of Congress, the number of votes cast for State officers at the same polls, is an offense against the federal election laws, of which the federal courts and commissioners have jurisdiction. Van Buren *v.* United States, 36 F. R., 77.

Act of February 26, 1885, prohibiting the importation of contract labor, provides in section 3 that every person violating its provisions shall forfeit for each offense the sum of $1,000, which may be sued for and recovered as debts of like amount are now recovered in the circuit courts of the United States, and that it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States. *Held*, that, as the suit to recover such penalty is of a *criminal* nature, this provision is not repealed by the act of August 13, 1888. United States *v.* Mexican Nat. R'y Co., 40 F. R., 769.

PLACE OF SUIT GENERALLY.

A suit to enforce or remove an incumbrance or lien may be brought against a non-resident and service may be had by publication. See section 8, *post.*

Section 1 of the act of March 3, 1875, as amended in 1887 and 1888, contains the clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Under this provision a circuit court has not jurisdiction of a suit by two plaintiffs, one of whom is a resident of the district in which suit is brought and one of whom is a resident of another State, against a defendant who is resident of another State. All the plaintiffs must be residents of the district in which suit is brought in order that it may be maintained. Smith *v.* Lyon, 133 U. S., 315; same case in lower court, Smith *v.* Lyon, 38 F. R., 53.

The provision in section 1 of the judiciary act of 1875, as amended in 1887 and 1888, as follows: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process of [or] proceeding in any other district than that whereof he is an inhabitant," does not apply to cases in admiralty. *In re* Louisville Underwriters, 134 U. S., 488.

The provisions of the act of March 3, 1887, section 1, regarding the place of bringing suit by original process in the circuit courts of the

PLACE OF SUIT GENERALLY — *continued.*

United States, do not apply in determining the question of jurisdiction on an application for the removal of a cause from the State court. Fales *v.* Chicago, M. & St. P. R'y Co., 32 F. R., 673.

Where the action is one of which the circuit courts have jurisdiction under the act of March 3, 1887, section 1, the controversy being one between a citizen of the State and a foreign subject, and the amount in dispute exceeding $2,000, the provision of that section in relation to the district where the action shall be brought does not affect the question of jurisdiction, and the privilege it accords to defendant is waived by filing a general appearance and answering to the merits. Norris *v.* Atlas Steamship Co., 37 F. R., 279.

Under the act of August 13, 1888, a federal circuit court has no jurisdiction of a suit by citizens of the district of suit against an alien temporarily in the district. Myer *v.* Herrera, 41 F. R., 65.

Under section 1 of the act of March 3, 1887, the process of federal circuit courts will not run throughout the United States, except in the particular cases and to the extent provided by Revised Statutes, section 738. Bourke *v.* Amison, 32 F. R., 710. Section 8 of the act of 1875 is an extension of Revised Statutes, section 738.

Even if the act confers a privilege merely, which defendant might waive, it is not waived by a formal appearance entered on the first rule-day, followed on the second rule-day by an assertion of the right to be sued only in the district of his residence. Reinstadler *v.* Reeves, 33 F. R., 308.

Where in a suit it appears that many of the defendants are from the same State, with conflicting interests, the controversy is between citizens of the same State, and the federal courts have no jurisdiction under act of March 3, 1887, giving them jurisdiction when the suit is between citizens of different States. Covert *v.* Waldron, 33 F. R., 311.

Under the act of March 3, 1887, when the jurisdiction depends upon grounds other than the citizenship of the parties, the defendant must be sued in the district of his domicile; but when the jurisdiction depends upon citizenship, the suit may be brought in the district in which either plaintiff or defendant resides. St. Louis, V. & T. H. R. Co. *v.* Terre Haute & I. R. Co., 33 F. R., 385.

Where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit may be brought in the district of the residence of either the plaintiff or defendant. Bank of Winona *v.* Avery, 34 F. R., 81.

Where the jurisdiction depends solely on the citizenship of the parties, plaintiff may bring the action in the district wherein he resides, without reference to the residence of the defendant if he resides in a different State. Bostwick *v.* American Finance Co., 43 F. R., 897.

Code Virginia, 1873, chapter 145, requires an administrator, when suing for damages for causing the death of his intestate, to bring the action in his own name, the amount recovered to go to the widow and children, if any; otherwise to be assets of the estate. *Held* that,

PLACE OF SUIT GENERALLY—*continued.*

where the administrator and defendant are citizens of different States, the action may be brought in a federal court though the deceased was a citizen of the same State with defendant, where his widow and children still reside. Harper *v.* Norfolk & W. R. Co., 36 F. R., 102.

Under the residence clauses of the act of March 3, 1887, a suit to enjoin the collection of a tax, on the ground that it violates the United States constitution, must be dismissed as to such defendants as are non-residents of the district in which it is brought. United States Exp. Co. *v.* Allen, Comptroller, 39 F. R., 712.

Under the act of 1888, providing that, when an action is between citizens of different States, it may be brought "in the district of the residence of the plaintiff or defendant," an action by a non-resident against a partnership, whose members are residents of different States and districts, may be brought in the district of the residence of one of them. Rawitzer *v.* Wyatt, 40 F. R., 609.

If on motion to dismiss for want of jurisdiction it appears that the jurisdiction is dependent wholly on adverse citizenship, and that one of the defendants lives in the district where suit is brought, and the other defendant and the plaintiff live in different districts, the action will be dismissed as to the non-resident defendant but not as to the resident defendant. Bensinger, etc., Co. *v.* National, etc., Co., 42 F. R., 81.

Although act of March 3, 1887, authorizes an original suit brought in the circuit court, where the jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and the statutes of Connecticut permit the attachment of the property, located in the State, of a non-resident defendant, without personal service on him, and in the absence of voluntary appearance, the subjection of such property to a judgment *in rem*, yet Revised Statutes, sections 914, 915, authorizing the practice and modes of procedure in federal courts to be conformed to those of the respective States wherein such courts are held, and authorizing the same remedies by attachment as are provided by the laws of those States, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings *in rem* against the property of a non-resident defendant, who has not been personally served or appeared. Harland *v.* United States Tel. Co., 40 F. R., 308.

A general appearance by the defendant in an action is a waiver of the objection that the service of summons on him was irregular, because not made in the district of which he was an inhabitant, as required by act of March 3, 1887. Foote *v.* Massachusetts Ben. Ass'n of Boston, 39 F. R., 23.

A circuit court having jurisdiction of the subject-matter and the parties, the right of a defendant to object to being sued in a district of which he is not an inhabitant is personal to himself, and he may insist upon or waive that right as he chooses. Purcell *v.* British, etc., Co., 42 F. R., 465.

PLACE OF SUIT GENERALLY — *continued.*

Acceptance of service being merely equivalent to personal service in the district does not prevent a defendant from moving to dismiss the suit because brought in a district in which he does not reside. United States *v.* Loughrey, 43 F. R., 449.

Where a bill shows on its face that defendant is not an inhabitant of the district wherein the suit is brought, defendant may assert his objection to being served out of the district of his residence by demurrer as well as by motion to dismiss. Miller-Magee Co. *v.* Carpenter, 34 F. R., 433; Reinstadler *v.* Reeves, 33 F. R., 308.

PLACE OF SUIT AGAINST A CORPORATION.

For patent and copyright suits in which the rights of a corporation are decided, see head, PATENT AND COPYRIGHT SUITS, *supra.*

When the jurisdiction of a federal circuit court is founded on any of the grounds specially mentioned in section 1 of the act of 1875, as amended in 1887 and 1888, except the diverse citizenship of the parties, the suit must be brought in the district of defendant's residence; but where the jurisdiction is founded solely on the ground that the plaintiff and defendant are citizens of different States, the suit may be brought in either the district of plaintiff's residence or of defendant's residence. In this case suit was brought in the district of plaintiff's residence against a sister-State corporation on whose agent due service was obtained within the district, and the jurisdiction of the federal circuit court over the suit was sustained. McCormick *v.* Walthers, 134 U. S., 41.

Where a foreign corporation (*e. g.*, a sister-State corporation) is not doing business in a State, and neither the president nor any other officer is there transacting business for the corporation, and representing it in the State, the corporation is not within the State so that service can be made upon it. Service upon the president temporarily present in the State amounts only to an informal notice to the corporation, and does not bring it into court. So held *arguendo*, the foreign corporation having waived defective service by appearance. Fitzgerald, etc., Co. *v.* Fitzgerald (1890), 137 U. S., 98.

A libel in admiralty *in personam* may be maintained against a corporation in any district by service there upon an attorney appointed by the corporation as required by the statutes of the State to receive service of legal process. Residence clauses of section 1 do not apply to admiralty suits. *In re* Louisville Underwriters, 134 U. S., 488.

A citizen of Mexico cannot sue a Connecticut corporation in the United States circuit court for the southern district of California, although the corporation has an office and managing agent in that district. Denton *v.* International Company of Mexico, 13 Sawyer, 355; S. C., 36 F. R., 1.

Where plaintiff is a citizen of Massachusetts, and defendant a corporation created by the law of Rhode Island, as well as by the law of Massachusetts, the suit may be brought in the federal court for the Rhode Island district. For the purposes of the suit defendant is to

PLACE OF SUIT AGAINST A CORPORATION — *continued.*

be deemed a citizen of Rhode Island. Page *v.* Fall River W. & P. Co., 31 F. R., 257.

Corporations are citizens and residents of the State under the laws of which they were created, and they cannot, by engaging in business in another State, acquire a residence there, within the meaning of the act of March 3, 1887. Fales, Adm'x, *v.* Chicago, M. & St. P. R'y Co., 32 F. R., 673.

Act of March 3, 1887, section 1, provides that suit shall be brought in the district of the residence of either party, when the action is between citizens of different States. *Held*, that federal courts will take jurisdiction when plaintiff is a resident of the district wherein he brings suit, and defendant a corporation created by laws of a foreign State. Rawley *v.* Southern Pac. R. Co., 33 F. R., 305.

A circuit court in Missouri has no jurisdiction of an action against a corporation created by the State of Mississippi, and having its principal office there, for damages for acts amounting to a violation of the interstate commerce law, though defendant has an office and agent in Missouri, and plaintiff resides there, and though the petition shows a cause of action at common law. Connor *v.* Vicksburg & M. R. Co., 36 F. R., 273.

Under the act of March 3, 1887, as amended by act of August 13, 1888, requiring an action in the federal courts to be brought in the district of which defendant is a resident, the federal courts of Illinois cannot obtain jurisdiction of an Iowa corporation by service of process. Jessup *v.* Illinois Cent. R. Co., 36 F. R., 735.

Under the act of March 3, 1887, as explained by the act of August 13, 1888, requiring an action in the federal courts to be brought in the district of which defendant is a resident, a New York corporation, having its principal office in that State, and doing business in Illinois, cannot be sued in the federal courts in Illinois. Preston *v.* Fire Extinguisher Manuf'g Co., 36 F. R., 721.

Act of March 3, 1887, providing that an action shall be brought in no other district than that of which defendant is an inhabitant, authorizes an action against a railroad corporation only in the State by whose laws it was created, though the greater part of its railway and its principal office are in another State, where its annual elections are held, and most of its officers and stockholders reside, and of which most of its directors are citizens. Filli *v.* Delaware, L. & W. R. Co., 37 F. R., 65.

A railroad company, whose road extends from Atlanta, Ga., through South Carolina to Charlotte, N. C., the office of its division superintendent being in Atlanta, may be sued in the Georgia court by a citizen of Georgia, for personal injuries received while traveling on its road in South Carolina, especially where it appears that the train on which the accident happened was being operated under the superintendent's control. Hills *v.* Richmond & D. R. Co., 37 F. R., 660.

A steamship company incorporated under the laws of, and having its principal office in, a European country, between which and the port

PLACE OF SUIT AGAINST A CORPORATION — *continued.*

of New York city its vessels ply, and whose piers for lading and unlading of its cargoes are in New Jersey, where its office for the transaction of its industrial operations in America is kept, but whose financial and monetary operations are conducted at the office of its agents in New York city, which office it advertises as its New York office, is not suable in New York under the act of March 3, 1887, section 1, requiring actions to be brought in the district of which the defendant is an "inhabitant." Hohorst *v.* Hamburg-Amer. Packet Co., 38 F. R., 273.

The act of March 3, 1887, does not oust said courts of jurisdiction of a suit against a foreign corporation which has agreed, as a condition of the right to transact business in the State, to submit to be sued there, since the right given by the statute is a personal exemption, which may be waived. Consolidated Store Service Co. *v.* Lamson Consolidated Store Service Co., 41 F. R., 833.

The limited partnerships of Pennsylvania having a capacity to sue and be sued by the partnership name, and exercising other functions analogous to or identical with those of corporations, are nevertheless not corporations entitled to sue as artificial citizens of the States, within the purview of the constitution and laws of the United States in that behalf. The federal courts will not extend the creation of such artificial citizens of the States in order to acquire jurisdiction over organizations that are not corporations, strictly so called. Imperial Refining Co. *v.* Wyman, 38 F. R., 574.

A corporation of another State, defendant in a suit in a federal court which has jurisdiction of the subject-matter, by appearing, filing answer and taking testimony, waives its right to insist at the hearing that it can be sued in the district of its residence only. McBride *v.* Grand De Tour Plow Co., 40 F. R., 162.

A corporation cannot acquire a residence in a State other than the one in which it is incorporated, within the meaning of act of 1887. Booth *v.* St. Louis Fire Engine Manuf'g Co., 40 F. R., 1.

A corporation does not acquire a residence in a State other than in the State in which it is incorporated by maintaining an office and having an agent there, within the meaning of the act of March 3, 1887. Bensinger, etc., Co. *v.* National, etc., Co., 41 F. R., 81.

A corporation chartered by a sister State is not a resident of the State within the meaning of the removal provisions of the act of 1875, as amended in 1887 and 1888, simply because it does business and has agents within such State. Fales *v.* Railway Co., 32 F. R., 673, followed. Henning *v.* W. U. Tel. Co., 43 F. R., 97.

When the plaintiff in an original bill in a federal court is a corporation of a sister State and has no agent or representative in the judicial district when the suit is pending, other than its solicitor in the suit, an order will be made for substituted service, as respects a cross-bill, upon such solicitor. Johnson, etc., Co. *v.* Union, etc., Co., 43 F. R., 331.

PLACE OF SUIT AGAINST A CORPORATION — *continued.*

In an action against a corporation and its officers in which relief is sought against the corporation and discovery from the officers, the latter are not merely nominal parties. Doyle *v.* San Diego, etc., Co., 43 F. R., 349.

Where a corporation, created by the laws of one State, by its officers or agents, comes into a judicial district of another State and there carries on business,— for example, operates lines of railway therein, and has there an agent upon whom, under the laws of the latter State, process may be served,— it is an inhabitant of said district, within the meaning of the act of Congress of March 3, 1887, and is suable in the circuit court of the United States of said district. Riddle *v.* New York, L. E. & W. R. Co., 39 F. R., 290. This decision conflicts with the preponderance of authority.

Plaintiff is a citizen of Mexico, and defendant is a Texas railroad corporation, whose principal office is in the eastern district of Texas, but whose railroad extends into the western district, in which it has agents to transact its ordinary business. By the Revised Statutes of Texas, article 4120, defendant's public office shall be considered its domicile. By article 1198, subdivision 21, defendant may be sued in any county into which its railroad extends, and process may be served on its local agent (art. 1223). *Held*, that suit may be brought in the western district. Zambrino *v.* Galveston, H. & S. A. R'y Co., 38 F. R., 449.

SUIT BY AN ASSIGNEE.

Under the act of March 3, 1875 (18 Stat., 470), the restriction of the original jurisdiction of United States circuit courts in suits by an assignee whose assignor could not have sued in a circuit court does not apply to a suit removed from a State court. Delaware County Commissioners *v.* Diebold, etc., Co., 133 U. S., 473, 486.

The provision relating to suits by assignees in section 1 of the judiciary act of 1875, as amended in 1887, does not affect an action of trespass for cutting and removing timber, brought by an assignee of the owner of the land. Ambler *v.* Eppinger, 137 U. S., 480.

That provision relates to claims arising on contracts of the original parties, not to a claim arising from a trespass to property. *Id.*

If A., a citizen of State M., gives B., a citizen of State N., an order for the payment of money drawn on C., a citizen or municipal corporation of State M., and C. accepts such order but refuses to pay it, a federal court has jurisdiction of a suit by B. against C. on such order on the ground of the diverse citizenship of the parties. The provision relating to suits by an assignee in section 1 of the act of August 13, 1888, does not forbid the federal court to take jurisdiction in such a case. Superior City *v.* Ripley (1891), 138 U. S., 93.

Under section 1 of the act of March 3, 1875, before its amendment in 1887, the assignee of a judgment founded on a contract could not maintain a suit on the judgment in a federal circuit court on the ground of diverse citizenship of the parties, unless it appeared

SUIT BY AN ASSIGNEE — *continued.*

affirmatively in the record that both the plaintiff and his assignor were not citizens of the same State with the defendant. Metcalf *v.* Watertown, 128 U. S., 586.

An action to recover damages for a refusal to accept and pay for merchandise under an oral contract is a suit to recover the contents of a chose in action, within the meaning of the act of March 3, 1887, and the circuit court has no jurisdiction of such suit in favor of an assignee, unless it might have been prosecuted in such court if no assignment had been made. Simons *v.* Ypsilanti Paper Co., 33 F. R., 193.

In the first section of the act of March 3, 1887, in the clause "or of any subsequent holder of such instrument be payable to bearer, and be not made by any corporation," the word "of," preceding the words "such instrument," should be held to be "if." Newgass *v.* City of New Orleans, 33 F. R., 196. The act of August 13, 1888, corrects the error mentioned.

Where the transfer of choses in action requires an assignment the court has no jurisdiction over cases where an assignee is plaintiff, unless the court would have had jurisdiction had the action been brought by the assignor. Newgass *v.* City of New Orleans, 33 F. R., 196.

Where the transfer of choses in action may be made by delivery, and the obligation is made to bearer and by a corporation, and the parties to the suit are citizens of different States, the court has jurisdiction, although had the suit been brought by a former holder the court would have had no jurisdiction. *Id.*

The circuit court has no jurisdiction of an action by an assignee on a county warrant payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignor was qualified to sue in this court; but has jurisdiction of an action by the holder on one payable to bearer, such being a negotiable security made by a corporation. Rollins *v.* Chaffee County, 34 F. R., 91.

Owens, wishing to borrow $10,000 of the plaintiffs, offered to give a note therefor, with the defendants as security; and, the plaintiffs consenting, he delivered them a note for the amount, signed by the defendants and payable to his order, which he at the same time indorsed, and also subscribed a waiver of notice and protest written thereon, and received the amount to his own use. The note not being paid when due, the plaintiffs brought this action against the defendants to recover the amount thereof. The defendants demur to the complaint for want of jurisdiction in the court. *Held*, that the plaintiffs are the payees, and not the assignees, of the note; and that there never was any assignment thereof, within the restriction on the jurisdiction of this court over an action to recover the contents of a promissory note contained in the last clause of section 1 of the act of 1887. Goldsmith *v.* Holmes, 36 F. R., 484.

Complainants, as the assignees of a judgment obtained in a State court by a citizen of the same State as the defendant in the judgment, sue

SUIT BY AN ASSIGNEE — *continued.*

in equity, by way of creditor's bill, to enforce said judgment against the insolvent debtor's property. *Held*, that the assignor could not have sued in the original proceedings in this court, and that his assignees cannot do so, under the act of 1888. Mississippi Mills *v.* Colm, 39 F. R., 865.

The sale of an equitable interest in land is not a mere assignment of a right of action relating thereto; and in a suit in a national court by the vendee to establish his right therein, it is not material what is the citizenship of his vendor under whom he claims. Gest *v.* Packwood, 39 F. R., 525.

Defendant city, having voted bonds for the erection of water-works, contracted for the same with F. & Co. Plaintiffs furnished the pipes for the works, and an agreement was made between plaintiffs, defendant and the contractors, by which plaintiffs were to be paid for the material furnished soon after the works were completed. Upon the completion of the works the contractors drew an order on the city in favor of plaintiffs for the amount due, which order was duly accepted by the defendant. *Held*, that the order and acceptance constituted a direct agreement between plaintiffs and defendant, and was not an assignment of the contractors' claim, within the meaning of act of August 13, 1888, providing that an assignee cannot bring suit in the circuit court unless the assignor might have done so had no assignment been made. Ripley *v.* City of Superior, 41 F. R., 113.

A promissory note payable to the order of ——, which was made for a valuable consideration, is in legal effect payable to bearer; and one who buys it from a lawful holder, and afterwards fills the blank by writing his own name therein as payee, is an assignee within the meaning of section 1 of the act of 1875, as amended in 1887 and 1888, and therefore not entitled to sue in a federal circuit court upon such note, the original holder and the maker both being citizens of the State in which suit is brought. Steel *v.* Rothbam, 42 F. R., 390.

By the provisions of section 1, as amended March 3, 1887, governing a suit by an assignee, it was intended to prohibit all suits by an assignee of a chose in action in a federal court where the original assignor could not maintain the suit, except suits on foreign bills of exchange and except notes made payable to bearer and executed by a corporation. Wilson *v.* Knox County, 43 F. R., 481.

Jurisdiction by removal from State court — Suit involving federal question.] § 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

Removal of other suits.] Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

Severable controversy.] And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

Removal for local influence.] And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

Remand of case removed for local influence.] At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

No appeal from remanding order.] Whenever any cause shall be removed from any State court into any circuit

court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

As amended by act of August 13, 1888. 25 Stat., 433.

REMOVAL FOR FEDERAL QUESTION.

A suit to recover property acquired by the removing defendant as receiver of a national bank by authority of the laws of the United States arises under the laws of the United States within the meaning of the removal act of August 13, 1888. Sowles *v.* Witters, 43 F. R., 700.

A suit in a State court against a receiver appointed by a federal court, brought without leave of the federal court, is removable to a federal circuit court, since it involves a federal question, *i. e.*, the construction of the provisions of the amendatory act of March 3, 1887, permitting a suit in a State court against a receiver appointed by a federal court. Evans *v.* Dillingham, 43 F. R., 177.

On motion to remand to the State court, by plaintiff, defendant sought to have the case retained, alleging that the matter in dispute arose under the constitution, laws or treaties of the United States. *Held*, that to give the court jurisdiction it must clearly appear from the record that the construction of some provisions of the constitution, laws or treaties must be met and decided before the issues in the particular cause can be finally disposed of, and the court will not take jurisdiction because a party asserts it exists, but in determining that matter will consider all points of law and fact that inhere to that jurisdictional question. State of Iowa *v.* Chicago, M. & St. P. R'y Co., 33 F. R., 391.

In an action in the nature of *quo warranto*, brought in the name of the State, by her attorney-general, to prevent a railroad company from exercising certain rights and privileges, and from controlling certain lands, the defendant petitioned for the removal of the cause to the circuit court of the United States, alleging that it acquired ownership in the land under an act of the legislature, and in accordance therewith exercised rights of ownership; that subsequently the act granting the land was repealed; that such repealing act was in violation of the provisions of the constitution relating to laws impairing the obligation of contracts, and of the fourteenth amendment, declaring that no person shall be deprived of property without due process of law. *Held*, that the petition showed an issue in the action arising under the federal constitution, within the meaning of the act of March 3, 1887, relating to the removal of causes from the State to the federal courts; and a disclaimer by the attorney-general of the State, that no reliance was placed on the repealing act, cannot operate to eliminate such issue. State of Illinois *v.* Illinois Cent. R. Co., 33 F. R., 721.

REMOVAL FOR FEDERAL QUESTION — *continued.*

An action between a receiver of an insolvent national bank and a depositor, involving only the right of set-off of deposits against notes due by the depositor, does not present a federal question, under Revised Statutes, section 5242, avoiding preference to creditors of such an insolvent bank. Cause remanded to State court. Tehan *v.* First Nat. Bank, 39 F. R., 577.

In order to remove a cause from a State to a United States court, under the act of 1887, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision in the case. Austin *v.* Gagan, 39 F. R., 626.

RIGHT OF REMOVAL IN GENERAL.

Under the judiciary act of March 3, 1875, and Revised Statutes, section 716, a *mandamus* suit begun in a State court cannot be removed from such court to a federal circuit court. Revised Statutes, section 716, and the act of 1875, taken together, limit the jurisdiction of federal circuit courts over *mandamus* suits to ancillary *mandamus* suits in which the court has acquired jurisdiction of the controversy before the institution of the *mandamus* suit. Rosenbaum *v.* Bauer (1887), 120 U. S., 450, which, in effect, overrules New Orleans, etc., R. Co. *v.* Mississippi, 112 U. S., 12, and Railroad Co. *v.* Mississippi, 102 U. S., 135, and People *v.* Colorado, etc., R. Co., 42 F. R., 638.

An appeal under a State law from an assessment of taxes to a State county court, which acts not judicially but as a board of commissioners, is not a "suit" within the meaning of the removal acts, and cannot be removed into a federal circuit court. Upshur County *v.* Rich, 135 U. S., 467.

Where a cause is removed from a State court to a federal court, on the ground of diverse citizenship, if the petition for removal and the record both fail to show affirmatively the existence of such diverse citizenship at the commencement of the suit as well as when the removal was asked, the cause will be remanded to the State court. La Confiance, etc., D'Assurance *v.* Hall (1890), 137 U. S., 61.

In order that a case may be removed from a State court to a federal circuit court under the act of March 3, 1875, the record of the case at the time of removal must show upon its face that the case is removable. No amendment of the record in the federal court is admissible to cure material defects existing in the record at the time of removal. Crehore *v.* Ohio, etc., R. Co., 131 U. S., 240.

Where neither the petition for removal of a cause from a State to a federal court on the ground of diverse citizenship, under the removal act of March, 1887, nor the record shows that defendant was a nonresident of the State where the suit was brought at the time of filing the petition, the federal court does not obtain jurisdiction and cannot allow the petition to be amended so as to give it jurisdiction. Freeman *v.* Butler, 39 F. R., 1.

Under the act of March 3, 1875, § 2, before its amendment in 1887, it was held that a *habeas corpus* suit was not removable from a State to

RIGHT OF REMOVAL IN GENERAL—*continued.*

a federal circuit court, because it involved no definite value in controversy. Kurtz *v.* Moffitt, 115 U. S., 487.

Under the amendatory act of 1887 the value in controversy must exceed $2,000 in order to give a federal circuit court jurisdiction of a suit by removal, *e. g.*, of a suit sought to be removed on the ground of local prejudice. *In re* Penn. Co., 137 U. S., 451.

A record and petition for removal of a cause from a State to a federal court which fails to show the citizenship of the petitioners at the time the suit was commenced does not entitle them to a removal. Seddon *v.* Virginia, T. & C. S. & I. Co., 36 F. R., 6.

The provisions of the act of March 3, 1887, section 1, regarding the place of bringing suit by original process in federal courts, do not apply in determining the question of jurisdiction on an application for the removal of a cause from a State court. Fales *v.* Chicago, etc., R. Co., 32 F. R., 673.

The statutes regulating the right of set-off may be effective to determine the sum or value of "the matter in dispute" in the suit sought to be removed, and yet not operate as restrictions imposed by State legislation upon the jurisdiction of the federal court. If, therefore, the suit be one appealed from a justice of the peace to the State circuit court, and the defendant file there a plea of set-off, claiming $3,000 against the plaintiff, but under the statute of the State he can recover no more than $500 in that court, it is that sum which is the "matter in dispute," and the federal court can have no jurisdiction by removal under the act of 1875, section 2. New York I. & P. Co. *v.* Milburn Gin & Machine Co., 35 F. R., 225.

In a suit for divorce defendant alleged in his petition for removal that the amount in controversy exceeded $2,000, upon the ground that the complainant charged in her bill that he was the owner of valuable real estate, and received an income of not less than $10,000 per annum, and prayed an award of alimony according to the equities of the case. *Held*, in view of the fact that the allowance of alimony was discretionary and the amount uncertain, that it could not be said to be a suit wherein the matter in controversy exceeded the sum of $2,000. Bowman *v.* Bowman, 30 F. R., 849.

A declaration containing a special count on an insurance policy for $2,250, alleging a total loss, and concluding "to plaintiff's damage $2,000," "for the recovery of which, with just costs, plaintiff brings suit," and common counts in *assumpsit* for $2,000, concluding as in the first count, shows that the amount in dispute exceeds $2,000, and the action is removable under the act of March 3, 1887. Platt *v.* Phœnix Assur. Co. of London, 37 F. R., 730.

Where there is nothing in the pleadings by direct averment as to the value in dispute, and no facts from which it can be ascertained that the sum or value is less than $2,000, and the petition for removal from the State to the federal court alleges that the matter in dispute exceeds the value of $2,000, which allegation is not controverted by special plea nor by affidavit, a motion to remand to the State court,

RIGHT OF REMOVAL IN GENERAL—*continued.*

for want of federal jurisdiction, must be denied. Langdon *v.* Hillside Coal & Iron Co., 41 F. R., 609.

Plaintiff having sued defendant for $3,500 in the State court is estopped to assert on a motion to remand that the value in controversy is less than $2,000, the jurisdictional amount. Henderson *v.* Cabell, 43 F. R., 257.

On petition for removal of a cause from a State court to a federal court, *held*, that the adverse citizenship of the parties sufficiently appeared from the whole record, and also that the amount in controversy exceeded $2,000. Chambers *v.* McDougal, 42 F. R., 694.

An information in the nature of *quo warranto*, under Revised Statutes of Illinois, chapter 112, against a railroad company for exercising possessory rights over lands without authority of law, although in form a criminal proceeding, is in its nature essentially a civil action, within the meaning of the act of March 3, 1887, relating to the removal of causes from a State to a federal court. State of Illinois *v.* Illinois Cent. R. Co., 33 F. R., 721.

Act of Iowa, April 5, 1888, section 27, entitled "An act to regulate railroad corporations," provides that any such railroad corporation guilty of extortion shall forfeit and pay the State of Iowa not less than $1,000 nor more than $5,000, to be recovered in a civil action by ordinary proceedings instituted in the name of the State. *Held*, that an action for such penalty, brought by the State, is one of a criminal nature, and not removable under the act of March 3, 1887. State of Iowa *v.* Chicago, B. & Q. R. Co., 37 F. R., 497.

An action brought under laws of New York, 1875, chapter 604, as amended by laws of 1885, in the name of the "shore inspector," to recover the penalty imposed by that act for depositing prohibited materials in the waters of the bay and harbor of New York, which penalty, when recovered, goes into the State treasury, is in effect an action by the State, and therefore not removable on the ground of citizenship under the act of March 3, 1887. It is in its nature penal, to enforce a police regulation, and not a suit "of a civil nature, at law, or in equity." Ferguson *v.* Ross, 38 F. R., 161.

In an action by the State against defendant, it was alleged in the petition that defendant unlawfully and knowingly fenced in a certain tract of the public and school lands of the State, and unlawfully used the same for grazing and herding purposes, without any lease; that by reason of this unlawful inclosure of land, and unlawful herding and grazing on said land, defendant was liable to plaintiff in the amount fixed by the State statute as penalty. *Held* that, according to the allegations of the petition, the action was essentially a criminal action, and, as such, was not subject to removal to the circuit court. State of Texas *v.* Day Land & Cattle Co., 41 F. R., 228.

Where Tutty, a white man, and Ward, a negro woman, were indicted in a State court for fornication, and thereafter repaired to the District of Columbia and were married, immediately returning to Georgia, and thereupon attempted to remove into the United States court the indictments pending against them, the petition for re-

RIGHT OF REMOVAL IN GENERAL — *continued.*

moval was denied, and the indictments remanded to the court of the State. State *v.* Tutty, 41 F. R., 754.

Where plaintiffs' title to the product of a mine has been established by a decree in a State court, a proceeding by plaintiffs against the same and other defendants to enforce their rights under the decree, although independent in form and involving a defendant who claims a superior title by purchase, is in effect merely a supplementary proceeding, inseparably connected with the original decree, and therefore not removable to the United States court. Wolcott *v.* Aspen M. & S. Co., 34 F. R., 821.

Where at the time of the lease an action of ejectment was pending against certain of the property transferred, and the lessee, instead of defending the action, sets up by bill in equity only such matters as could by the law of the forum have been pleaded to the action of ejectment, such suit does not constitute a distinct and independent controversy, though the formal parties to the record are different. And such cause cannot be removed into the federal court unless the original action might also have been removed. Richmond & D. R. Co. *v.* Findley, 32 F. R., 641.

A suit by a judgment creditor to subject land in the name of the debtor's brother to the payment of the judgment on the ground that the purchase price of the land was paid by the debtor, and the deed taken in the brother's name for the purpose of defrauding creditors, is not supplementary or auxiliary to the original suit, but an independent proceeding against new parties and on new issues, and is removable under the act of 1875. Kalamazoo Wagon Co. *v.* Snavely, 34 F. R., 823.

Where a railroad company by a contract of perpetual lease acquired property of the lessor for which an action of ejectment was pending, *held*, the lessee's right of removal was only such as existed in the lessor. Richmond & D. R. Co. *v.* Findley, 32 F. R., 641.

A proceeding by a railroad company for the condemnation of land is an action at law and removable to the federal court. Following Searl *v.* School Dist., 124 U. S., 197. Kansas City & T. R. Co. *v.* Interstate Lumber Co., 37 F. R., 3.

A federal court does not acquire jurisdiction of a suit removed from a State court by virtue of an attachment made in the State court where there was no personal service of process on defendant, a resident of another State. Perkins *v.* Hendryx, 40 F. R., 657.

A suit for divorce was removed under the act of March 3, 1887, defendant denying in his petition the allegation of marriage set out in the bill, and claiming that the controversy arose between citizens of different States. *Held*, upon motion to remand, that the case could not be removed upon the issue made, as the determination of such issue would not necessarily dispose of the case. Bowman *v.* Bowman, 30 F. R., 849.

Where a case has been removed, on the petition of defendant, from a State court to a United States court, by reason of the difference of citizenship of the parties, a motion to remand, on the ground that

RIGHT OF REMOVAL IN GENERAL — *continued.*

the cause of action has been assigned to one who is of the same citizenship as the defendant, cannot be granted when the record simply shows a motion in the State court, before the removal of the cause, for leave to substitute a new plaintiff, on which motion the court took no action. Smith *v.* Chicago, B. & Q. R'y Co., 30 F. R., 722.

A party does not waive the right of removal by remaining in the State court and contesting the case on the merits, if the State court, upon due application, wrongfully refuses to order a removal of the cause. Richards *v.* Incorporated Town of Rock Rapids, 31 F. R., 505.

An Illinois corporation was sued in the supreme court of New York, and the cause was removed to the federal circuit court for the southern district, whereupon defendant filed a plea alleging that the court had no jurisdiction, or, if it had, that it ought not to exercise it, for the reason that the cause could be tried with greater convenience in the courts of Illinois. *Held* that, as no controlling authority appeared to warrant such a proceeding, the plea should be overruled. Spies *v.* Chicago & E. I. R. Co., 32 F. R., 713.

The intention of the amendatory removal act of March 3, 1887, to restrict removals from State to federal courts, is so clear that it should be strictly construed against any one seeking to evade the additional requirements which it puts upon the right of removal. Dwyer *v.* Peshall, 32 F. R., 497.

The right of a citizen to remove a case into a federal court is not a vested right of property. The rules of statutory construction when vested rights are concerned do not apply when the jurisdiction of a federal court to entertain a removal case has been cut off by act of Congress. Manley *v.* Olney, 32 F. R., 708.

Plaintiff was born in New York, but removed to New Jersey in 1868, where he married in 1877, and continued to reside until the death of his wife in 1880. He then took his children to Scotland. On his return he located in New Jersey, and lived there, boarding until 1884, when he went to St. Louis. His business was contracting for street work, and he secured many important contracts there for granite paving. He also formed a partnership with defendant for quarrying granite. He then closed out his business in New Jersey, and moved such of his machinery as he could not sell to St. Louis. After living there for two years, part of the time in a hotel and part with relatives, he sued defendant in the federal court for dissolution of partnership, alleging that he was a citizen of New Jersey. *Held*, that the facts set out established a residence in Missouri, and that they were not overcome by a secret purpose of plaintiff to return to New Jersey when his business in Missouri was concluded at some indefinite future period. Wright *v.* Schneider, 32 F. R., 705.

Where the contest is about the facts only, the law being undisputed, there can be no removal. Austin *v.* Gagan, 39 F. R., 626.

Under the act of March 3, 1887, an action pending in a State court may be removed by defendant to a federal circuit court although neither party is a resident of the district. Here the suit was in the circuit

RIGHT OF REMOVAL IN GENERAL—*continued.*

court for the southern district of New York by aliens against citizens of Missouri. Uhle *v.* Burnham, 42 F. R., 1.

Under the act of August 13, 1888, a petition for removal of a cause by a corporation of one State sued in a sister State is not sufficient unless it alleges, in addition to the usual averment as to citizenship, that it is a non-resident of the State in which it is sued. Hirsch *v.* J. T., etc., Co., 42 F. R., 803.

When a proper bond and petition for removal have been filed in the State court, the omission to ask the State court to act on the petition is no ground for remanding the cause. Brown *v.* Nelson, 43 F. R., 614.

Where a cause has been remanded to a State court because the petition for removal by the defendant did not set forth the diverse citizenship of the parties at the commencement of the suit as well as at the time of removal, the defendant cannot again remove the cause on the ground of diversity of citizenship. Johnston *v.* Donvan, 24 Blatch., 274.

The right to remove to federal courts causes pending in the Territorial courts of Dakota when the two States of Dakota were admitted to the Union depends upon the enabling act of February 22, 1889, section 23, not upon the act of March 3, 1875, as amended in 1887 and 1888. Herman *v.* McKinney, 43 F. R., 689.

Under the act of February 22, 1889, providing for the admission of the Dakotas as States of the Union and the transfer of pending causes from the Territorial courts to the newly-established federal courts in those cases in which a federal court would have had jurisdiction of the cause if it had existed at the time the cause was begun, a cause may be removed in which the plaintiff was a citizen of Dakota Territory and the defendant a citizen of a State at the beginning of the suit. Dorne *v.* Richmond, etc., Co., 43 F. R., 690.

Where a cause is once removed from a State to a federal court, and there are no jurisdictional objections to its remaining there, the facts, that a defendant has signed the removal bond as surety, and that the other surety had no authority to sign, are not, where the bond is otherwise ample, sufficient grounds for remanding the suit. Chambers *v.* McDougal, 42 F. R., 694.

An action for the recovery of $2,000, with interest, was commenced in the State court in December, 1886. On May 3, 1887, it was removed to the circuit court on petition of the defendant, and there tried, resulting in a verdict, June 21, 1887, in favor of the plaintiff. The application for removal was made prior to March 3, 1887. The defendant then moved to remand on the ground that the amount in controversy did not exceed, exclusive of interest and costs, the sum of $2,000. *Held*, that under the amendatory act of March 3, 1887, limiting the right to removal in actions of this kind to cases where the amount in dispute exceeds $2,000, exclusive of interest and costs, the circuit court had no jurisdiction of the cause, and it should be remanded. Lazensky *v.* Supreme Lodge Knights of Honor, 32 F. R., 417.

RIGHT OF REMOVAL IN GENERAL — *continued.*

The circuit courts of the United States, sitting in Ohio, have no jurisdiction to try a suit brought under the particular statutes of that State to contest the validity of a will by an original bill for that purpose; and, as under the act of Congress of March 3, 1887, no cause can be removed from a State court to the United States circuit court, unless the circuit court would have had original jurisdiction of the controversy involved in the case, such a controversy is not, under that act, a proper subject for removal. Reed *v.* Reed, 31 F. R., 49. Gaines *v.* Fuentes, 92 U. S., 10, and Ellis *v.* Davis, 109 U. S., 485, are cited by the court and distinguished.

The act of 1887 is not unconstitutional, though by virtue of the removal the circuit court obtains jurisdiction of the entire cause, including controversies between plaintiff and the resident defendants. It only gives effect to the constitutional provision respecting controversies between citizens of different States, and with that view the single federal ingredient, the citizenship of defendant in another State, is controlling. Whelan *v.* New York, L. E. & W. R. Co., 35 F. R., 849. *Accord*, Fisk *v.* Henerie, 32 F. R., 417.

REMOVAL — *Parties.*

A non-resident plaintiff, suing in a State court, against whom a counterclaim is brought, is a "defendant" within the provision of the act of March 3, 1887, which limits the right of removal to the "defendant being . . . a citizen of another State" than that in which the suit was brought. Carson & Rand Lumber Co. *v.* Holtzclaw, 39 F. R., 578.

An action was brought in a State court of Colorado, in which the plaintiff was an alien, and the defendant a New York corporation. On application to docket the cause in the United States circuit court for the district of Colorado, *held* that, under the act of 1887, which provides that a suit between citizens of different States shall be brought only in the district where either the plaintiff or defendant resides, the case was not transferable. Harold *v.* Iron Silver Min. Co., 33 F. R., 529. See Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 37 F. R., 3, digested on the next page.

Under the act of March 3, 1887, an action by a citizen brought in the State court of plaintiff's district against a non-resident defendant may be removed to the federal court by the defendant. Tiffany *v.* Wilce, 34 F. R., 230.

Under the act of March 3, 1887, a citizen of one State, sued in a State court of another State by a citizen of the latter, has the right of removal to the United States circuit court. Swayne *v.* Boylston Ins. Co., 35 F. R., 1; Fales *v.* Chicago, etc., R. Co., 32 F. R., 673.

Plaintiff, a resident corporation of Colorado, sued defendants, one of whom was a citizen of Minnesota and one of Wisconsin, in a Colorado court, and defendants removed the case to the United States court for the district of Colorado. *Held*, that it was properly removed as coming under the provisions of the second clause of sec-

REMOVAL — *Parties — continued.*

tion 2 of the above act. Pitkin County Min. Co. *v.* Markell, 33 F. R., 386.

Where the suit involves a controversy between citizens of different States, and the federal jurisdiction depends solely on that fact, if the suit be one in which the plaintiff is a citizen of the State in which the suit is brought and the defendant is a non-resident of that State, the latter may remove the case from the State court in which it is brought to the proper federal court, under the act of March 3, 1887. Gavin *v.* Vance, 33 F. R., 84.

Under the act of March 3, 1887, an action pending in a State court may be removed by defendant to the federal court, though neither party is a resident of the district; the restriction as to the place of bringing suit being in the nature of a personal privilege, which defendant may waive. Overruling Harold *v.* Mining Co., 33 F. R., 529. Kansas City & T. R. R. Co. *v.* Interstate Lumber Co., 37 F. R., 3.

Where, in a cause removed from a State court to the circuit court of the United States for the northern district of Georgia, it appears that the complainant is a citizen of the State of Alabama, and the real defendant, having an interest in the controversy, is a citizen of the State of Ohio, removal having been made by the citizen of Ohio, on motion to remand upon the ground that the citizenship of the parties was not such as to give the circuit court jurisdiction, *held*, that the cause was removable. First Nat. Bank *v.* Merchants' Bank, 37 F. R., 657.

Under the act of March 3, 1887, section 2, authorizing the removal into a circuit court by a non-resident defendant of an action pending in a State court where federal circuit courts "are given original jurisdiction by the preceding section," an action may be removed from a State court although it could not have been originally commenced in the district owing to the fact that neither party was resident therein. Aamsinc *v.* Baldeiston, 41 F. R., 641.

Under the act of 1887, section 2, clause 2, a suit is not removable by a resident defendant. Weller *v.* J. B. Pace Tobacco Co., 32 F. R., 860; Anderson *v.* Anderson, 32 F. R., 855; Mills *v.* Newell, 41 F. R., 529; Schofield *v.* Demorest, 40 F. R., 273.

In cases involving but a single controversy, where the jurisdiction of the court depends only upon the citizenship of the parties, the right of removal is governed solely by the second clause of the second section of the act of March 3, 1887, and can be exercised only by non-resident defendants. Western Union Tel. Co. *v.* Brown, 32 F. R., 337.

Under the act of 1887, section 2, providing for the removal of causes from a State to a circuit court, "by the defendant or defendants therein, being non-residents" of the State, a cause containing but a single controversy cannot be removed, where some of the defendants are residents of the State. Arkansas Valley Smelting Co. *v.* Cowenhoven, 41 F. R., 450.

The circuit courts of the United States have jurisdiction, by removal, of a suit begun in a State court by a resident citizen against a non-

REMOVAL — *Parties — continued.*

resident alien defendant, notwithstanding the provision of the act of 1887 that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant. In such case jurisdiction exists by virtue of the citizenship of the plaintiff and alienage of the defendant; and the provision that the defendant shall not be sued in any other district than that of which he is an inhabitant is only a privilege, of which he may or may not avail himself. Cooley *v.* McArthur, 35 F. R., 372.

An alien sued in the State of his residence by citizens of another State upon an ordinary debt cannot remove the action to the circuit court of the United States under the provisions of the act of March 3, 1887, authorizing removal of causes "by the defendant or defendants therein, not being residents of that State," and also the removal of a cause in which there is a controversy "wholly between citizens of different States." Cudahy *v.* McGeoch, 37 F. R., 1.

Under act March 3, 1887, section 2, providing for the removal of a cause by a defendant, being a non-resident of the State, a defendant who is an alien is not entitled to a removal of a cause from a court of the State of which he is a resident, and a cause removed by an alien defendant will be remanded where it is not averred that he is a non-resident of the State. Walker *v.* O'Neill, 38 F. R., 374.

A foreign corporation, *e. g.*, a sister State corporation, sued in a State court by a citizen of the State has a right to a removal to the circuit court. Wilson *v.* Western Union Tel. Co., 34 F. R., 561.

A suit brought in the supreme court of New York by a citizen of that State against a Pennsylvania corporation was removed, on the defendant's motion, to the circuit court of the United States under the removal act of March 3, 1887. *Held*, that the removal was authorized by the statute, the defendant not being a resident of New York, and a motion to remand to the State court must be denied. Following Fales *v.* Railway Co., 32 F. R., 673. Loomis *v.* New York & Cleveland Gas Coal Co., 33 F. R., 353.

A corporation, though conducting business in several States, can reside only in the State in which it was created. The averment in a petition for removal of a cause from a State to a federal court that a corporation was created under the laws of a certain State precludes the idea that it may have become a resident of another State. Petition for removal by sister State corporation sustained. Dissenting from Hirschl *v.* Threshing Machine Co., 42 F. R., 803. Myers *v.* Nelson, 43 F. R., 695.

A corporation organized under the laws of a foreign country, and having a general office there, does not become a resident of a State of the Union by doing business and having an office there, so as to defeat its right to remove a cause against it from a State court to a federal court under the amendatory act of 1888, providing for removal of causes by a non-resident defendant. Purcell *v.* British, etc., Co., 42 F. R., 465.

REMOVAL — *Parties — continued.*

A foreign corporation (*e. g.*, chartered by Great Britain) doing business in Texas through a local agent, and being under Texas law subject to suit by service on the local agent, is not a non-resident, and is not entitled to remove a cause to the federal courts under the act of August 13, 1888, providing for removal by non-resident defendants. Scott *v.* Texas, etc., Co., 41 F. R., 225.

On appeal by a tax-payer to a State district court from an allowance of a claim by the county supervisors, as provided by Compiled Statutes of Nebraska, page 855, section 1010, the appellee, being the party who is bound to establish his claim, must be regarded as plaintiff, and, as such, has no right of removal to the federal court, under the act of March 3, 1887, which gives such right to the defendant only. Tullock *v.* Webster County, 40 F. R., 706.

Where a non-resident creditor of the estate resists an application for an allowance to a widow, and removes the entire proceeding to a United States court, it will be remanded, where the administrator is a resident of the same State as the widow. McElmurray *v.* Loomis, 31 F. R., 395.

In an action under Compiled Laws of Kansas of 1885, chapter 105, section 80, for damages for illegally driving cattle into the State which communicated the Texas fever to plaintiff's cattle, brought against the importer and the purchaser, who have assumed the liability, the importer's interest is not adverse to that of the purchasers, so as to justify his classification as a plaintiff, and thereby give defendants a right of removal, on the ground of citizenship, to the federal courts. Woodrum *v.* Clay, 33 F. R., 897.

An action of replevin between citizens of the same State is not removable to the federal courts by reason of the non-residence of one from whom defendant purchased the property, and who intervenes to protect the defendant's title. Bronson *v.* St. Croix Lumber Co., 35 F. R., 634.

A lessee is interested in the controversy in a suit to set aside his lessor's title to the leased premises as fraudulent, and to quiet title in complainant; and when he, being a resident of the same State as complainant, is made a party defendant, though the lessor is a resident of another State, the controversy is not wholly between citizens of different States, and is not removable. Miller *v.* Sharp, 37 F. R., 161.

A citizen of New York filed his bill for partition in the federal circuit court in Mississippi against citizens of Mississippi as tenants in common, and also joined as defendant a railroad company, a Mississippi corporation, which claimed title to the land adversely to all the tenants in common. *Held*, that as to the controversy between the tenants in common in regard to the partition, the court had jurisdiction, but as to the controversy between the tenants in common and the railroad company it had no jurisdiction, as the parties having the same rights and interests were not all citizens of States different from those on the other side. Beebe *v.* Louisville, N. O. & T. R. Co., 39 F. R., 481.

REMOVAL — *Parties — continued.*

An action brought by a citizen and resident of the eastern district of Texas against a citizen of another State, in a State court in the western district, is removable to the circuit court of the latter district. Burck *v.* Taylor, 39 F. R., 581.

An action for a tort against two railway companies, one of which is lessor and the other a lessee, being joint and several, may be removed by one of the defendants on the ground of non-residence though the other defendant is a resident of the same State as the plaintiff. Spangler *v.* Atchison, etc., R. Co., 42 F. R., 305. But see Louisville, etc., R. Co. *v.* Wangelin, 132 U. S., 599.

When an action for partition is instituted in the United States court, all the plaintiffs on one side must be non-residents of the State in which the suit is brought, and jurisdiction cannot be conferred by making a necessary party plaintiff a defendant, who is a resident of the State, whose interests are all in common with those of the complainants, and against whom no antagonistic act is alleged. Rich *v.* Bray, 37 F. R., 273.

Complainant, a citizen of Texas, the heir of B., sued his co-heirs, citizens of Arkansas, claiming from the first defendant, who had obtained the legal title to the ancestor's property, a one-fourth interest, and from the other two defendants, partition. The last two defendants filed a cross-bill, claiming separate ownerships of one-fourth interest, and also partition. *Held*, that although the interests of the last two defendants and that of complainant were the same as against defendant who claimed the legal title, their interests were not so identical in other respects as to require their being joined as complainants; and a plea in abatement to the jurisdiction on the ground that they were collusively made defendants to give the federal court jurisdiction should be overruled. Belding *v.* Gaines, 37 F. R., 817.

Under act of March 3, 1887, the circuit court cannot take cognizance of a suit brought against a party in a district of which he is not an inhabitant; and section 2 does not authorize the removal of a suit brought in a State court against a party not an inhabitant of the district. County of Yuba *v.* Pioneer Gold Min. Co., 32 F. R., 183. Overruled.

An attachment suit, being the first levied, was removed to the federal court, the State court directing the receiver to retain so much of the fund as belonged to that suit and pay the balance into the registry of the State court, which was done. *Held*, that on the failure of the removed attachment in the federal court the defendant was entitled to the fund, and that it would not be returned to the State court to answer subsequent attachments not removed; but any surplus retained by the receiver should be by him paid under the order of the State court. Mack *v.* Jones, 31 F. R., 189.

After removal the bill was demurred to on the ground that the heirs of P., who appeared in the caption as necessary parties, were not properly made parties; the bill containing no allegation that their names and residences were unknown, or that they were non-residents.

REMOVAL — *Parties — continued.*

The demurrer was sustained and the bill amended by setting out the names of the heirs and their citizenship as of the same State as that of the complainant. There was no severable controversy. *Held*, the amendment being compulsory, the case should be remanded and not dismissed. Perry *v.* Clift, 32 F. R., 801.

The act of March 3, 1887, gives to the circuit court immediate jurisdiction upon the filing of the required petition and bond in the State court where the action is pending, the case being removable; and no act of the State court is necessary to or can prevent the jurisdiction of the circuit court from attaching, which court upon the filing of a copy of the record may proceed with the case as if it had been originally entered there. Wilson *v.* Western Union Tel. Co., 34 F. R., 561.

Where a defendant, after filing proper petition and bond in the State court for removal of the case to the federal court, again appears in the latter court and makes motions in the case, among others for continuance, such appearance does not confer jurisdiction upon the State court, and the case, having been properly removed, can be tried only by the federal court. Baltimore & O. R. Co. *v.* Ford, 35 F. R., 170.

A plea in abatement to a petition to remove a case from a State to a federal court will not be tested by technical rules, but it is sufficient if it sets out fairly and with sufficient certainty matters of fact which, if true, negative the jurisdiction of the federal court. Johnson *v.* Accident Ins. Co. of North America, 35 F. R., 374.

REMOVAL — *Non-essential Parties.*

Plaintiff, a citizen of Connecticut, brought in a State court of Connecticut an action of *assumpsit* against several non-residents, and the borough of Danbury, a municipal corporation of Connecticut. A motion to remand will be denied where the corporation defendant has been made such without, according to the testimony of the plaintiff and each of the defendants, so far as they have testified, any legal claim against it in such action, and where it appears that the corporation is in fact a sham defendant, though not made so for fraudulent purposes. Collins *v.* Wellington, 31 F. R., 244.

The voluntary assignee of an insolvent, a citizen of Illinois, brought suit in the courts of that State to set aside an alleged fraudulent preference. The preference consisted in the insolvent, on the day he made the assignment, turning over to one J., also a citizen of Illinois, certain warehouse receipts, to be held by him for the indemnity of a creditor residing in New York. Both J. and the creditors were made parties to the suit. A receiver was appointed, to whom J. turned over the receipts. Default was entered against J. for want of answer, and the creditors removed the cause to the federal court. *Held*, on motion to remand on the ground of the common citizenship of J. and the assignee, that the only question left open being whether the creditor took title to the receipts as against the assignee, J. was not a necessary party, and that the case should be retained,

REMOVAL — *Non-essential Parties — continued.*

the federal court being as competent as the State court, in the event of the dismissal of the bill, to order the return of the receipts to J. Judah *v.* Iowa Barb-Wire Co., 32 F. R., 561.

In an action for damages for the death of plaintiff's intestate caused by the falling of a building, the owner of the building, a resident of another State, and the tenant in occupation, a resident of the State where action was brought, were joined as parties defendant. The complaint did not show that the tenant was in any way responsible for the unsafe condition of the building, or that he was bound to put the building in good condition, but alleged merely that he was the tenant in occupation. *Held*, that the tenant was improperly joined as a defendant, and such joinder could not operate to defeat a non-resident defendant's right of removal from the State court to the federal court. Nelson *v.* Hennessey, 33 F. R., 113.

In a suit against a corporation and its directors jointly, to cancel subscriptions to the corporate stock, and to compel the defendants to refund the amounts already paid on the same, the directors are not merely nominal parties; and where one of them is a citizen of the District of Columbia, or a citizen of the same State as plaintiff, the suit is not removable under the act of March 3, 1887, providing that any suit in which the controversy is wholly between citizens of different States shall be removable to the United States circuit court. Seddon *v.* Virginia, T. & C. S. & L Co., 36 F. R., 6.

Complainant, a citizen of Iowa, filed a bill charging that a judgment had been fraudulently obtained against the city of Cedar Rapids, Iowa, in favor of defendant S., a non-resident, by means of a combination between him and others not made parties to the bill. The relief sought was to have the judgment declared void. The mayor, treasurer and recorder of the city were made defendants, that they might be restrained from paying the judgment *pendente lite*, but it was not charged that they participated in the fraud, or that they had any interest adverse to complainant. *Held* that, though there was no separable controversy between complainant and S., the other defendants were only nominal parties, their interest being in fact adverse to S., and their joinder as defendants could not affect the right of S. to have the cause removed. May *v.* St. John, 38 F. R., 770.

Revised Statutes, section 737, authorizing the court to proceed to the trial of the suit between the parties properly before it, when there are several defendants, and one or more of them are neither inhabitants of nor found within the district, and do not voluntarily appear, does not relate to the removal of causes. Ames *v.* Chicago, S. F. & C. R'y, 39 F. R., 881.

The presence on the record of one who is merely an agent or attorney for the principal defendant will not affect the right of removal as between the principal parties to the controversy. Myers *v.* Nelson, 43 F. R., 695.

REMOVAL — *Non-essential Parties — continued.*

When the controversy is between the plaintiff and the removing defendant, who are citizens of different States, the fact that there are other defendants, citizens of plaintiff's State, does not prevent the removal of the case where the interest of one such defendant is identical with plaintiff's interest and the other co-defendants are merely nominal parties. Brown *v.* Nelson, 43 F. R., 614.

By joining a nominal defendant who will not unite with the real defendants in an application to remove, the plaintiff cannot defeat the real defendant's right to remove. Henderson *v.* Caball, 43 F. R., 257.

REMOVAL — *Practice.*

Read in connection with head, *Practice in General, post,* page 66.

Under the Missouri statute for the condemnation of land by railway companies, providing that a summons shall be issued to the owner, giving him ten days' notice of the time when the petition will be heard, where the cause is removed to the United States circuit court on the return-day of the summons, the appointment of commissioners by the latter court to assess damages is a proceeding in the cause, and will not be made prior to the next regular term after the removal. Kansas City & T. R'y Co. *v.* Interstate Lumber Co., 36 F. R., 9.

Under the statute requiring that after the filing of the petition and bond for removal the petitioner shall file a copy of the record in the circuit court on the first day of the next term, and that the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court, while the court's jurisdiction becomes vested when the petition and bond are filed, the time for pleading does not begin to run till the record is entered. Torrent *v.* Martin Lumber Co., 37 F. R., 727.

The removing party is not left remediless by a remand, since the removing order did not absolutely take away the State court's jurisdiction, but merely held it in abeyance while the cause was in the circuit court, and the State court is now bound to resume it. Birdseye *v.* Schaeffer, 37 F. R., 821.

The fact that removal into the federal court was had upon the application of the defendant is immaterial on his motion to dismiss, if the controversy is one of which the court has no jurisdiction. Ferguson *v.* Ross, 38 F. R., 161.

When special bail is not originally demandable in an action, the removal bond need not contain a condition for the entry of the defendant's appearance in the federal court, though he has not yet entered such appearance in the State court, as the act mentioned only requires that condition when special bail may originally be demanded. Burck *v.* Taylor, 39 F. R., 581.

Defendant does not, by appearing in the State court for the purpose of removing the case to the federal court, thereby waive any irregularity as to service of process. Perkins *v.* Hendryx, 40 F. R., 657.

REMOVAL — *Practice — continued.*

Where a cause is removed from a State to a United States circuit court, and the plaintiff amends his complaint, he puts himself within a rule of practice of the circuit court, allowing a defendant, "in all cases," to demand security for costs before answering, though the demand could not have been made in the State court where the action was commenced. Henning *v.* Western Union Tel. Co., 40 F. R., 658.

The period allowed defendant to answer or demur by code of South Carolina is suspended by filing in the State court bond and petition for removal to the United States circuit court; and begins to run again when the record is filed in that court; and under the circuit court rules (fourth circuit), the defendant will be in time if he serve his defense before the rule-day next thereafter. Pelzer Manuf'g Co. *v.* St. Paul Fire & Marine Ins. Co., 40 F. R., 185.

The rules of practice of a United States circuit court govern a cause brought there from a State court, under the act of 1888, providing that "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court." Henning *v.* Western Union Tel. Co., 40 F. R., 658.

In cases removed from the State court, costs accrued prior to such removal are taxable upon final judgment in federal court. Cleaver *v.* Traders' Ins. Co., 40 F. R., 863.

Under rule 79 of the circuit court of the ninth circuit, the plaintiff may, at any time after defendant has filed and submitted to the State court his petition and bond for removal of a cause, procure a transcript of the record of the cause from the State court, and file the same in the circuit court, and, after service of notice thereof, as prescribed in said rule, the circuit court will take jurisdiction of the case for all purposes. Delbanco *v.* Singletary, 40 F. R., 177.

The federal court will allow plaintiff, before verdict, in an action removed from a State court in Georgia, to discontinue his suit as to part of the amount sued on, which he could do before removal under code of Georgia, section 3479, authorizing amendments at any stage of the cause as matter of right. Nussbaum *v.* Northern Ins. Co., 40 F. R., 337.

REMOVAL — *Separable Controversy.*

Under the removal acts of 1875 and 1887 the right to remove a separate controversy is confined to citizens of different States, and these acts repeal the act of July 27, 1866, and Revised Statutes, section 639, clause 2, giving the right to aliens. Woodrum *v.* Clay, 33 F. R., 897.

Under the act of March 3, 1875 (18 Stat., 470), section 2, a suit in a State court against two jointly for a tort cannot be removed by either defendant into a federal circuit court upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded separately, and the plaintiff might have sued either alone. Louisville, etc., R. Co. *v.* Wangelin, 132 U. S., 599.

Where, in a suit against a resident living within the district and a non-resident, the cause of action declared upon is joint, the non-service

REMOVAL. — *Separable Controversy — continued.*

of process upon the resident does not change the character of the suit so as to entitle the non-resident to have it removed as for a separable controversy. Patchin *v.* Hunter, 38 F. R., 51.

Nor is the jurisdiction of the federal court in such cases aided by the Revised Statutes, section 737, authorizing the court to entertain jurisdiction as to parties properly before it, notwithstanding the absence of necessary parties not inhabitants of nor found within the district where suit is brought, and providing that non-joinder of such parties shall not constitute matter of abatement or objection to the suit. *Id.*

Under Revised Statutes Ohio, section 5859, providing that "all devisees, legatees and heirs of the testators and other interested persons, including the executor or administrator, must be parties" to a proceeding to contest the validity of a will, where the contestant is a resident of Ohio, and of the three defendants two are also residents of that State and the third of New York, there is no separable controversy, for the purposes of removal, between the contestant and such third defendant. Reed *v.* Reed, 31 F. R., 49.

The third clause of the second section of the act of March 3, 1887, relating to removal of causes, like the second clause of the second section of the act of March 3, 1875, governs that class of cases only where there are two or more controversies involved in the same suit, one of which is wholly between citizens of different States; and under the act of 1887, the right of removal in the cases last mentioned is limited to one or more of the defendants actually interested in such separable controversy and does not extend to the plaintiffs therein. Western Union Tel. Co. *v.* Brown, 32 F. R., 337.

Where, in an action on a bond against several defendants, one of them being the principal obligor and the others his sureties, the only relief sought is a money judgment against all the defendants, there is, for the purpose of removal, but a single controversy in the case. Western Union Tel. Co. *v.* Brown, 32 F. R., 337.

In an action to establish a will of real estate, where there were a large number of defendants in different States, one of the defendants removed the cause from the State court to the United States circuit court. *Held*, that an action to establish a will is not a separable but a single controversy, and its removal is not authorized by the act of 1887, relating to the removal of causes. Anderson *v.* Appleton, 32 F. R., 855.

Action was brought by a non-resident assignee of an insolvent debtor to compel the assignment, by a corporation, of stock belonging to the debtor. Purchasers at a sale on execution levied on the stock subsequent to the debtor's assignment intervened, were made parties defendant, and asked for a removal of the cause as to them under act of March 3, 1887, section 2, providing that "when there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants may remove said suit," etc.

REMOVAL — *Separable Controversy — continued.*

Held, that the cause of intervenors being inseparable from that of the corporation, it could not be removed. Weller *v.* J. B. Pace Tobacco Co., 32 F. R., 860.

Nor is it important that the contractor has not been served with summons, and has not appeared, as the right of removal must be tested solely by the case made by the complaint. Ames *v.* Chicago, S. F. & C. R'y Co., 39 F. R., 881.

The fact that in order to obtain a mechanic's lien against the property of the company the plaintiff is required to show that he filed a notice of his lien in the proper county in the proper time, in addition to showing that he is entitled to a judgment against the contractor, does not make the controversies separable. *Id.*

In an action by resident tax-payers against county officials and bondholders, one of whom is a non-resident, to restrain the collection of a tax levied for the payment of alleged illegal bonds, and to cancel the bonds, there is no separable controversy with relation to the county officials and bondholders. Anderson *v.* Bowers, 40 F. R., 708.

The citizenship of the county officials will not defeat the right of removal on the part of the non-resident bondholder, as the former must be deemed to be interested on the same side of the controversy with the complainants. Following Harter *v.* Kernocham, 103 U. S., 562. *Id.*

But the bonds not being all owned by the non-resident defendant, but by several, one or more of whom were residents, and the record not showing that the bonds owned by the non-residents belonged to a different issue or series from those owned by resident bondholders, there was not a separable controversy pending between complainants and the non-resident which would authorize a removal of the cause. *Id.*

The removal of a cause from a State to the federal court does not depend upon the question of what issue remains to be tried, but must be determined by the nature of the cause of action presented in the complaint. If there be but one, involving many defendants, the fact that each makes a separate defense does not make separable controversies; nor does the default of one of them, or his disclaimer of title to the land in controversy, give a right of removal to the contesting defendant, who is a citizen of a State other than that of the plaintiffs. Hax *v.* Caspar, 31 F. R., 499.

To an action against a railroad company by one asserting an indebtedness claimed to be a first lien on the defendant's track, a mechanic's lien claimant and the mortgagee of the company were made parties. The mechanic's lien claimant filed a cross-petition asserting his lien, to which the mortgagee was made a party. The mortgagee, in his petition for removal, claimed that his lien was prior to each of the lien claimants, and that the mechanic's lien claimant was estopped to assert a lien superior to that of the mortgage. *Held*, that the controversy presented was simply the question of priority

REMOVAL — *Separable Controversy — continued.*

of liens, and that the petition failed to show a separable controversy between the mortgagee and either of the lien claimants which could be determined without the presence of the railroad company. Bissell *v.* Canada & St. L. R'y Co., 39 F. R., 225.

A petition showed that plaintiff was the owner of certain bonds, of which the defendant S. had wrongfully obtained possession; that S. had recovered a judgment for their amount and collected a portion of it; he assigned it to C., who obtained a judgment for the amount still unpaid, with an order charging it on certain lands; that the assignment from S. to C. was made with the intent to defraud the creditors of S., and that C. recovered the judgment in trust for S.; and prayed that the title of the second judgment might be divested out of S. and C. and vested in plaintiff, and for an accounting for the sums collected on the two judgments. *Held*, that the petition disclosed but a single cause of action against both defendants, and that the cause was not removable on the ground of a separable controversy. Sexton *v.* Seelye, 39 F. R., 705.

Revised Statutes of Missouri, 1879, section 3206, which gives contractors and material-men a lien on a railroad for work and labor done and for materials furnished, provides that in suits by a subcontractor to enforce a lien it shall be optional with him to make or not to make the contractor a party defendant. When the contractor is made a party the statute contemplates a personal judgment against him as in ordinary cases, with a conditional clause that, if sufficient property of his is not found, the residue be made out of the property charged. When he is not made a party there is only a special finding of the amount due, and a judgment that it be made out of the property charged. *Held*, that when the contractors are made parties there are not two separate causes of action, and hence the controversy between the plaintiff and the railroad company is not a separable one within the meaning of the act of 1887, section 2, clause 3. Ames *v.* Chicago, S. F. & C. R'y Co., 39 F. R., 881.

Plaintiff, a citizen of Massachusetts, filed his complaint in a State court of New York against three corporations, citizens of New York, Connecticut and Massachusetts, respectively, to obtain the restoration of certain stock and other property originally conveyed by plaintiff's intestate to the Connecticut company under a mutual mistake of fact, and which, as alleged, is now in the possession of the Massachusetts company, which received it with full knowledge of plaintiff's equities. *Held*, that both the Massachusetts and Connecticut companies are necessary parties, and there is no separate controversy with the latter so as to entitle it to remove the cause to this court. Vinal *v.* Continental Const. & Imp. Co., 35 F. R., 673.

A bill by one partner against others, praying an account of the proceeds of partnership property sold by some of the partners to a corporation, also a defendant, upon which sale it averred that part of the purchase money is still due, and praying that defendant partners be

REMOVAL — *Separable Controversy — continued.*

enjoined from selling, and the defendant corporation from permitting the transfer on its books of certain stocks of the corporation belonging to the firm, and the appointment of a receiver, does not present a separable controversy between the corporation and any of the parties, and is not, therefore, under the third clause of act of March 3, 1887, section 2, removable to a federal court at the instance of the non-resident corporation. Yearian *v.* Horner, 36 F. R., 130.

An action for damages for wrongful levy on the goods of plaintiff, who resides in the State in whose court the suit is brought, against the creditors causing the levy, residents of another State, their agent and attorneys in the proceedings, is not removable by reason of the diverse citizenship of the parties, as some of the defendants reside in the same State with plaintiff, and the controversy is not separable. Following Sloane *v.* Anderson, 117 U. S., 275. Southworth *v.* Reid, 36 F. R., 451.

A bill of complaint filed in a State court of New York by a citizen of Massachusetts, against a corporation of Connecticut and a corporation of New York, averred a cause of action and prayed for damages and an accounting as against the Connecticut corporation alone, for failure to perform a contract. *Held*, that the Connecticut corporation was entitled to a removal under the act of Congress of March 3, 1887; the plaintiff and the removing defendant having a separable controversy, they being citizens of different States, and the removing defendant not having been sued in his own State. Vinal *v.* Continental Const. & Imp. Co., 34 F. R., 228.

Separate answers tendering separate issues, interposed by defendants sued jointly, do not create separable controversies within the meaning of the removal acts. Patchin *v.* Hunter, 38 F. R., 51.

Plaintiff, a citizen of New York, brought his action in Iowa for the recovery of the immediate possession of certain realty, and damages for injury to buildings and for conversion of crops. Citizens of Iowa and Vermont were made defendants. It was not averred that they claimed title jointly or under a common source, or had committed the injuries jointly, but the petition was drawn under the Iowa statutes for settling all adverse claims of title on the part of any and all the defendants. An amended petition set out that certain of the Iowa defendants had executed a lease in their own right to the other Iowa defendant, and that he held possession under this lease. *Held*, that there was a separable controversy between the plaintiff and the Iowa defendants, which was removable on the application of the alleged lessee. Stanbrough *v.* Cook, 38 F. R., 369.

In cases coming within the removal act of 1887, section 2, clause 3, providing that suits "which include a controversy which is wholly between citizens of different States, and which can be fully determined as between them, are removable by either one or more of the defendants actually interested," the right of removal is given to defendants interested in the controversy, irrespective of their residence or citizenship. *Id.*

REMOVAL — *Separable Controversy — continued.*

In an action of tort, in which plaintiff's declaration charges all the defendants as jointly liable, there is no separable controversy, and it is immaterial that plaintiff may not be able to prove such joint liability. The declaration must govern. Kaitel *v.* Wylie, 38 F. R., 865.

TIME OF APPLICATION TO REMOVE IN STATE COURT.

A petition for the removal of a cause under the act of March 3, 1887, must be filed in the State court at or before the time at which a plea is due, according to the State practice. If filed afterwards, the State court should deny the application. Kansas City, etc., R. Co. *v.* Daughtry, (1891) 138 U. S., 298.

Omission of the plaintiff to exercise his right to take a default does not extend defendant's time for removal. *Id.*

An action was commenced in a State court February 10, 1887. The defendant's time to answer would have expired March 2d, but, by stipulation, the time to answer was extended to March 30th. A petition and bond for removal were filed April 8th. *Held,* the petition was filed too late. Simonson *v.* Jordon, 24 Blatch., 374; S. C., 30 F. R., 721.

A defendant had lost the right of removing a suit from the State court into a federal circuit court before the act of March 3, 1887, was passed. After that act was passed the pleadings were amended, and he filed a petition for removal with his amended answer. *Held,* that he was too late. Woolf *v.* Chisolm, 24 Blatch., 405; S. C., 30 F. R., 881.

A suit instituted in the State court, on a petition for executory process on a title importing a confession of judgment, is removable to the United States circuit court, after executory process has been ordered, and the debtor has filed an opposition denying the plaintiff's right, and asking the revocation of the order; the requisite averments as to amount involved and citizenship being conceded. Lockhart *v.* Morey (Cir. Ct. E. D. La.), 31 F. R., 497.

The right of removal is not defeated or lost if the petition therefor is filed in the State court after motion made, the decision of which does not affect the merits of the controversy. Richards *v.* Incorporated Town of Rock Rapids, 31 F. R., 505.

An application for the removal of a case from a State court, if made while the case is pending for trial, is made "before the trial thereof," within the intent of the removal acts, although there may have been any number of mistrials, or trials in which the verdict was set aside or the jury disagreed. Fisk *v.* Henarie, 32 F. R., 417; S. C., 13 Sawyer, 38.

Under the New York code of procedure the defendant must serve his answer by the twentieth day after service of the complaint, unless the time is extended by order of court or by written stipulation. *Held,* that an oral agreement between the parties to the effect that the suit, which was only brought as a stalking-horse to beguile third persons, was not to be pushed, and that no answer would be required, was not such an extension as was provided for by either the

TIME OF APPLICATION TO REMOVE IN STATE COURT — *continued.*

laws of the State or the rules of the State court, and that a petition for removal filed after the twenty days were up came too late; the amendatory removal act of March 3, 1887, requiring such petition to be filed "at the time or any time before the defendant is required, by the laws of the State or the rule of the State court in which such suit is brought, to answer or plead." Dwyer *v.* Peshall, 32 F. R., 497.

An action was begun in New York by complaint, and removed, fourteen days after service of the complaint, into the United States circuit court, by the defendant, where it was filed. Nineteen days after the filing, a demurrer was served, which was refused on the ground that it came too late, whereupon a motion was made to compel plaintiff to accept it. *Held*, under the removal statutes, providing "that after the removal the cause shall then proceed in the same manner as if originally commenced in the said circuit court," the time for answering or demurring had expired: but the motion would be considered as an application to open a default, and would be granted. Heidecker *v.* Red Star Line Steamship Co., 32 F. R., 706.

Defendant pleaded to a declaration in February, 1887, and in May filed his petition for removal into a federal court. The act of March 3, 1887, in reference to the jurisdiction of the circuit courts of the United States, repealed the act of 1875, under which this case was, at that time, removable, and provided that petitions for removal must be filed at the time of pleading. *Held*, that the case must be remanded. Manley *v.* Olney, 32 F. R., 708.

Defendant, his demurrer to bill having been overruled on appeal by the supreme court of the State, filed his petition for removal, April 12, 1887, on the grounds of (1) citizenship, and (2) local influence and prejudice. *Held*, that the application came too late, the act of March 3, 1887, requiring petitions for removal on the first ground to be filed at the term to which the case is returnable, and those on the second ground "before trial," and the hearing and determination of a demurrer being a "trial," within the meaning of that act. Lookout Mountain R. Co. *v.* Houston & Co., 32 F. R., 711.

If an order of publication be issued under the attachment laws of Tennessee instead of under the sections of the code regulating chancery proceedings, it can have no effect to foreclose the time of removal, if the suit be of an equitable nature and the attachment has issued on the fiat of the chancellor. The distinctions in procedure between these two classes of cases must be observed in their relation to the act of Congress of March 3, 1887, regulating removal to the federal court. Gavin *v.* Vance, 33 F. R., 84.

Under the provisions of the Tennessee code regulating equity proceedings against non-resident defendants, and the equity rules of practice governing those courts, the filing of an answer or plea by the defendant does not abridge the time allowed for removal, and his petition is still in time if filed before the time elapses allowing him to defend the suit. It is the expiration of the time allowed to de-

TIME OF APPLICATION TO REMOVE IN STATE COURT—*continued.*

fend which terminates the right of removal, and not the filing of the demurrer, plea or answer under the act of March 3, 1887. *Id.*

Where a defendant has removed a cause from a State to a federal court, and plaintiff, at the time of appearing in the latter court, does not suggest to it that the time had elapsed within which a removal could properly be had, nor move to remand to the State court, but demands a trial, he waives his right to raise the question in answer to defendant's bill to restrain the further prosecution of the suit in the State court. Baltimore & O. R. Co. *v.* Ford, 35 F. R., 170.

Plaintiff filed his complaint in the State court at the January term, 1888, and by the summons fixed March 5th, the first day of the next term, as the day for defendant's appearance, but without indorsement thereon on the complaint, as required by Revised Statutes of Indiana, 1881, section 401. *Held*, that the docketing of the cause for March 5th was irregular, as under section 400 the cause could not be called for issue until the second day of the term, and such docketing, though under a rule of court, could not have the effect of a rule to answer, so as to preclude defendant's motion to remove to the federal court at a subsequent day of the same term. McKeen *v.* Ives, 35 F. R., 801.

In an action begun in a state court defendant was by State statute required to answer the complaint on or before May 1, 1888. On May 1st defendant appeared specially in the case, and moved to set aside the service of summons, but neither sought nor obtained any rule or order of court extending its time to plead to the complaint. The motion to quash the service of summons was heard and taken under advisement by the court May 28th. While the same was so under advisement, on May 31st defendant filed its general answer to the complaint, and at the same time filed its petition and bond on removal to this court. On motion to remand, *held*, that the case must be remanded; the petition and bond not having been filed in the State court at the time defendant was by law required to answer or plead to the complaint; no extension of time having been granted by any rule or order of said State court. Wedekind *v.* Southern Pac. Co., 36 F. R., 279; S. C., 13 Saw., 475.

Under the act of Congress of March 3, 1887, providing that a party desiring to remove a suit from a State to a circuit court of the United States shall file his petition and bond in the State court, a filing of the petition and bond with the clerk of the State court is not sufficient, as the court itself has a right to pass upon them, and the cause will be remanded. Shedd *v.* Fuller, 36 F. R., 609.

Where an act changing the time of holding a term of court is passed, but too late to permit the holding of a term at the substituted time, and a special term in lieu thereof is called, proceedings for the removal of a cause, the petition and bond in which were filed before the time for holding the regular term as fixed either by the act or the former law, are before the special term for the purposes of a motion to remand; the act providing that process from the clerk's

TIME OF APPLICATION TO REMOVE IN STATE COURT — *continued.*

office shall be returnable at the substituted term, and Revised Statutes, sections 669, 670, enabling a special term to transact all business that may be transacted at a regular term. Kansas City & T. R. Co. *v.* Interstate Lumber Co., 37 F. R., 3.

Under the removal act of March 3, 1887, authorizing the defendant to file his application on the ground of diverse citizenship in the State court at any time before he is required to plead or answer the complaint, where, on the last day of the term of the State court, and after the time to answer or plead, the complaint is amended, demanding $10,000 instead of $2,000, a petition for removal to the federal court before the next term of the State court is filed in time. Huskins *v.* Cincinnati, 37 F. R., 504.

By the rules of the State court judgment *pro confesso* might be entered if defendant did not plead, answer or demur by the June rules. Prior thereto defendant's counsel filed a motion to take the bill from the files, and at the next term in September filed a demurrer. *Held,* that an application filed after the motion had been disallowed and the demurrer overruled was filed after the time in which the defendant was required to plead or answer, and was too late. Tennessee Coal, Lumber & Tan-Bark Co. *v.* Walker, 37 F. R., 545.

Under the act of March 3, 1887 (sec. 3), requiring the application for removal to be made at the time, or at any time before, the defendant is required to answer or plead, it is not too late to make the application after a motion to take the bill from the files and a demurrer to the bill have been disposed of. *Id.*

If it is irregular to file an affidavit and bond for removal the day before taking a formal order making mover a party and removing the cause, such irregularity is cured by an order the next day making him a party and reciting the fact as to the filing of the bond and removal of the cause. First Nat. Bank *v.* Merchants' Bank, 37 F. R., 657.

If the plaintiff have leave to amend a sheriff's return showing parties to have been served, not before so appearing on the record, this necessarily extends the defendant's time for pleading indefinitely under the Tennessee practice, and the time for removal is likewise extended, since he cannot be compelled to plead in such a case, within the statutory limit, under the penalty of a forfeiture of his option of removal if he do not waive the irregularity and remove or plead. Lockhart *v.* Memphis & L. R. R. Co., 38 F. R., 274.

If the party entitled to judgment by default for any failure of his adversary to file his pleading within the time prescribed by the Tennessee code, fail to enter judgment for the default, the opposite party may file the pleading at any time, indefinitely, as a matter of right, without the application to the court to enlarge the time; wherefore a petition for removal to the federal court is filed in time, under the act of March 3, 1887, if filed before or at the time the defendant files his plea to the declaration or complaint, although the original time allowed by the code has expired, as the right of removal is coextensive with the right to plead in such a case. *Id.*

TIME OF APPLICATION TO REMOVE IN STATE COURT — *continued.*

If the defendant file pleas in abatement to the writ within the time limited by the Tennessee code for filing pleas, or within any subsequent time belonging to him as a right because of the failure of the plaintiff to take a default for want of a plea, or because of an order of the court allowing time to plead, this extends indefinitely the time for pleading to the declaration of complaint; and until the pleas in abatement are disposed of, and the right of pleading to the declaration or complaint has expired, the right of removal lasts. If, then, neither an order of the court nor any general rule of practice fixes some time as a limit for further pleading, the right of removal continues as long as the right to plead lasts, and a removal petition is in time filed at or before the time of pleading to the declaration or complaint. *Id.*

Under the removal act of 1887, requiring the petition for removal to be filed "at the time, or any time before, the defendant is required by the laws of the State or the rule of the State court in which the suit is brought to answer or plead to the declaration or complaint," an extension of time to answer by consent of parties does not extend the time for filing the petition for removal. Dixon *v.* Western Union Tel. Co., 38 F. R., 377.

Where a defendant, after the time to answer has expired, procures an *ex parte* order extending his time, contrary to the practice in the State court, and then files an application for removal, the application is not filed, within the meaning of the removal act of March 3, 1887, "before the defendant is required by the laws of the State court" to answer the complaint. Hurd *v.* Gere, 38 F. R., 537.

Under act of March 3, 1887 (§ 3), as amended by act of August 13, 1888, providing that the application for removal of a cause to the federal court must be made at or before the time the defendant is by the laws of the State or the rules of court required to plead to the declaration, where defendants, their plea in abatement having been quashed, are required to plead to the merits instanter, but omit to do so, a petition for removal filed nearly a month afterwards is too late, and it is immaterial that plaintiffs did not take a default as they might have done. Kaitel *v.* Wylie, 38 F. R., 865.

A federal court not having obtained jurisdiction of a cause upon the first attempt to remove it, its order remanding the cause is no bar to a subsequent removal on the same transcript. Freeman *v.* Butler, 39 F. R., 1.

Where the federal court has remanded the cause because of the defective record and petition, an amended petition, filed in the State court, relates back to the time when the original petition was filed, and is in time if that was. Freeman *v.* Butler, 39 F. R., 1.

A petition for removal, filed in the State court on the earliest day possible, is an abandonment of a prior appeal from an interlocutory order which cannot be superseded, *i. e.*, appointment of receiver, where the appeal does not appear to have been perfected. *Id.*

TIME OF APPLICATION TO REMOVE IN STATE COURT — *continued.*

Section 3 of the act of March 3, 1887, requiring a petition for removal to be filed before defendant is compelled to plead to the action under the State practice, is complied with by the timely filing of the petition, though it is not actually presented to the court until after the expiration of the time to plead. Burck *v.* Taylor, 39 F. R., 581.

Under act of March 3, 1887, as corrected by act of August 13, 1888, requiring an application for removal from a State to a federal court to be made at or before the time the defendant "is required by the laws of the State or rule of the State court in which the suit is brought to answer or plead," where, on the third day of the term, defendant is ruled to answer, and files a plea in abatement on the next day, which is overruled on demurrer on the sixth day, a petition for removal, not filed until the seventh day, is too late, even if the plea in abatement suspended the rule to answer, as such rule became operative on the overruling of the plea. Browning *v.* Reed, 39 F. R., 625.

The bond required by the statute, as well as a petition, must be filed at or before the time for answering expires, to effect a removal. Austin *v.* Gagan, 39 F. R., 626.

The court cannot, by an order made after the time to answer has expired directing the bond to be filed *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the State court, which has already become vested and fixed under the statute. *Id.*

The application for removal, under the act of 1887, must be made at or before the expiration of the time to answer, as prescribed by the statute or rules of court in force at the time of the service of the summons. Subsequent extensions of time to answer by special orders of the court, or by stipulations of the parties, cannot extend the time to apply for a removal under the statute. *Id.*

A sheriff levied on a stock of goods sold by a failing debtor to one H., who afterwards replevied the goods from the sheriff in the State court. In the replevin suit a verdict was rendered in favor of H., which the court set aside. One of the attaching creditors was added, on request, to the sheriff, as a party defendant, and asked a removal to the federal court on account of citizenship. *Held*, that the application, after one trial, in which the creditor was represented by the sheriff, came too late, when the new trial was to be on the same issues and questions. Hakes *v.* Burns, 40 F. R., 33.

Defendants demurred to plaintiffs' complaints in the State court. The demurrers were heard and sustained in the State court, and plaintiffs were given leave and time to file amended complaints, which they filed. To plaintiffs' amended complaints defendants demurred, and at the same time filed their petitions and bonds for removal of the cases to this court. *Held*, that the petitions and bonds were not filed within the statutory time, and that the cases must be remanded. Delbanco *v.* Singletary, 40 F. R., 177.

When an amended petition for removal is filed in a State court, which

TIME OF APPLICATION TO REMOVE IN STATE COURT — *continued.*

makes a case substantially different from that stated in the original petition, the time for removing the cause is to be calculated with reference to the amended petition. Evans *v.* Dillingham, 43 F. R., 177.

Under the section of the act of August 13, 1888, which provides that a petition for removal must be filed at or before the time the defendant is required to plead "by the laws of the State or the rules of the State court," where the State law requires the defendant to plead on or before the third day of the term, "unless longer time be granted by the court," a petition for removal cannot be filed after the third day of the term, although the defendant's time for answering has been extended by order of court, since such an order is not a rule of court within the meaning of the federal statute. Spangler *v.* Atchinson, etc., R. Co., 42 F. R., 305.

Under the removal act of 1888, section 3, providing that the petition for removal must be filed "at the time, or any time before, the defendant is required by the laws of the State, or the rule of the State court in which suit is brought, to answer or plead to the declaration," an extension of the time to file the answer beyond the time expressly provided in the State statute does not extend the time to file a petition for removal beyond that time. Velie *v.* Manufacturers' Accident Indemnity Company of the United States, 40 F. R., 545.

The statute provides that the petition for removal shall be filed at or before the time when the defendant is required to plead in the State court. *Held*, on particular facts, that the petition was filed in time. Sowles *v.* Witters, 43 F. R., 709.

REMOVAL — *Practice in General.*

See head *Practice, ante*, page 54.

The allowance in a federal court of an amendment to a petition for the removal of a cause from a State court, if allowable at all, is a matter of discretion, and error cannot be assigned on the decision. Ayers *v.* Watson, 137 U. S., 584, 585.

An issue of fact (*e. g.*, the question of the citizenship of a party) raised upon a petition for the removal of a cause from a State court to a federal court must be tried in the federal court, not in the State court. Kansas City, etc., R. Co. *v.* Daughtry (1891), 138 U. S., 298.

Section 720 of the Revised Statutes, prohibiting a United States court from granting an injunction to stay proceedings in a State court, does not apply to proceedings in a State court in a case that has been legally removed from the State court into the United States court, but in such a case the writ will not be issued if the jurisdiction of the United States court of the case removed is doubtful. Injunction denied. Wagner *v.* Drake, 31 F. R., 849.

A plaintiff may be enjoined from pressing the trial of a cause in the State court, where proper petition and bond has been filed for its removal to the federal court, and judgment rendered in such latter court. Baltimore & Ohio R. Co. *v.* Ford, 35 F. R., 170.

After the removal of a cause into a federal court, a party cannot, on recovering judgment, be allowed the costs prescribed by the State

REMOVAL — *Practice in General — continued.*

statutes up to the time of removal, unless such items are taxable under sections 823, 824, Revised Statutes. Chadbourne *v.* German-American Ins. Co., 31 F. R., 625; S. C., 24 Blatch., 539.

When an action is removed from a State court to a federal court, the action continues the same, and all rulings made or opinions expressed in the highest court of the State are treated precisely as if they had been made in the federal court: otherwise if the action in the State court be discontinued, and a new action begun in the federal court. Hence, where, in an action upon a policy of insurance, the Supreme Court of the State had held that certain conduct upon the part of the insurance company should be submitted to the jury as evidence of its intention to waive a forfeiture for over-insurance, *held*, that such ruling was binding upon the federal court. Cleaver *v.* Traders' Ins. Co., 40 F. R., 711.

In a suit for partition removed to a federal court the federal court will follow State decisions holding that a right of entry in plaintiff without actual seizin is sufficient. McClaskey *v.* Barr, 42 F. R., 609.

Whether or not a removal bond shall have a fixed penalty, a bond otherwise valid is properly accepted where the penalty is sufficient to cover the costs likely to accrue. Kentucky *v.* Louisville Bridge Co., 42 F. R., 241.

A petition for removal, filed by a railroad company, one of the defendants, averring that petitioner was a corporation created under the laws of Wisconsin; that complainants were citizens of Massachusetts; that the other defendants were citizens of States other than Massachusetts; that petitioner was the sole owner of a part of the land in dispute, and was in sole possession thereof; and that none of the other defendants had or claimed any interest therein,— shows a separable controversy between complainants and the petitioner, and entitles the latter to a removal. Bacon *v.* Felt, 38 F. R., 870.

In an action to set aside a general assignment, each of the plaintiffs being a separate judgment creditor of the assignors, where no issue is raised as to the judgments, and the only facts controverted being those tending to impeach the *bona fides* or validity of the assignment, and the preferences created by it, and the only issue being whether or not the assignment was fraudulent, no such separable controversy is presented as to authorize a removal of the action on the ground of the diversity of citizenship, some of the plaintiffs being residents of the same State as the defendant. Reineman *v.* Ball, 33 F. R., 692.

An action on a partnership obligation is not separable, so as to entitle one partner to remove it on the ground of citizenship. Woodrum *v.* Clay, 33 F. R., 897.

A bill was filed, the objects of which were: First, to restrain the B. & O. Company from using or transferring one thousand one hundred and sixty shares of stock of the G. & G. Company; second, if the stock had not been issued, to restrain its issuance; third, to enjoin

REMOVAL — *Practice in General — continued.*

the collection or negotiation of bonds transferred by the G. & G. Company to the B. & O. Company. The G. & G. Company had issued the stock, and transferred the bonds to the B. & O. Company, before the commencement of the action. The G. & G. Company's answer adopted the B. & O.'s answer, and showed that it had no interest in the controversy. *Held*, that as it was necessary to notice the second prayer, the stock having been issued, and as the only relief which could be granted was under the first and third prayers, relating solely to the B. & O. Company, the action was separable, and the G. & G. Company not a necessary party. County Court of Taylor County *v.* Baltimore & O. R., 35 F. R., 161.

REMOVAL FOR LOCAL PREJUDICE — *Right to Remove.*

Under the judiciary act of March 3, 1887, the matter in dispute must exceed $2,000 in order to give a circuit court jurisdiction of a suit removed from a State court, as well in cases sought to be removed from a State court on the ground of local prejudice as in other cases. *In re* Penn. Co., 137 U. S., 451 (same case below, 42 F. R., 420), overruling McDermott *v.* Chicago, etc., R. Co., 38 F. R., 529; Frishman *v.* Ins. Co., 41 F. R., 449. Value in dispute must exceed $2,000. Malone *v.* Richmond, etc., R. Co., 35 F. R., 625.

Under "the local prejudice clause" of the act of March 3, 1887, restricting the right of removal to causes in which the amount in controversy exceeds a specified sum, a petition for removal showing that plaintiff's claim was less than the required sum, but averring a counter-claim by defendant in excess thereof, which was denied by plaintiff, shows a sufficient amount involved to confer jurisdiction on the federal court. Carson & Rand Lumber Co. *v.* Holtzclaw, 30 F. R., 578.

The act of March 3, 1887, section 2, repeals by implication Revised Statutes, section 639, subsection 3, providing for the removal of causes from a State court to a federal court on the ground of local prejudice. Short *v.* Chicago, etc., R. Co., 33 F. R., 114; Whelan *v.* New York, etc., R. Co., 35 F. R., 849; Southworth *v.* Reid, 36 F. R., 451; Minnick *v.* Union Ins. Co., 40 F. R., 369. *Contra*, Fisk *v.* Henarie, 35 F. R., 230 and 417; S. C., 13 Sawyer, 38 and 318.

Under the act of March 3, 1887, a petition for removal from a State court on the ground of local prejudice will be dismissed when it does not show that all the plaintiffs are citizens of the State in which the suit is brought. Rike *v.* Floyd, 42 F. R., 247.

The right of removal for local influence does not exist where the controversy is a controversy between a citizen of the State in which suit is brought on one side, and a citizen of the same State and a citizen of another State on the other side. Anderson *v.* Bowers, 43 F. R., 321.

Where the plaintiff is a citizen of Minnesota and the defendant is a corporation of Wisconsin doing business in Minnesota, the circuit court for the district of Minnesota has, under the act of Congress of March 3,

REMOVAL FOR LOCAL PREJUDICE — *Right to Remove — continued.*

1887, amending the "removal act" of 1875, original jurisdiction of the controversy when that question depends solely on the fact of the diverse citizenship of the parties, and the defendant may remove the case on the ground of local prejudice. Following Fales *v.* Railway Co., 32 F. R., 673, and differing from County of Yuba *v.* Mining Co., 32 F. R., 183. Short *v.* Chicago, M. & St. P. R'y Co., 34 F. R., 225.

A cause to which an alien is a party is not removable to the United States circuit court under the "local prejudice" clause of the removal act of 1887, which provides for the removal of controversies between citizens of the State in which the suit is brought and citizens of other States on the ground of local prejudice. Cohn *v.* Louisville, N. O. & T. R. Co., 39 F. R., 227.

A corporation created by the consolidation of several corporations existing in different States by an act of the legislature, which provided that such corporation should be treated as a corporation created by the laws of the State authorizing the consolidation, is, as concerns a suit against it by an alien, a citizen of that State, and not entitled to a removal of such suit under the local prejudice clause of the act of 1887. *Id.*

Held, (1) that the cause was improperly removed to the federal court and that it cannot take jurisdiction of the same; (2) that the removal of a cause from a State court on account of prejudice or local influence, under the act of 1867, as re-enacted in subdivision 3, section 639, Revised Statutes, could only be had, as settled by numerous decisions of the Supreme Court, when all the parties to the suit on one side are citizens of different States from those on the other; (3) that the language of the act of 1867, on which such decisions were based, having been copied into the act of 1887, the same construction must be given to the latter act; (4) that, while the original complainants were the only party plaintiffs, there was clearly no right of removal on the part of the defendants or either of them; (5) that the joinder of A. G. S. as co-complainant, in a representative suit so brought, in no way changed the character, object or purpose of the suit, and did not confer upon the defendant, the R. & D. R. Co., the right to remove the suit to the federal court. Whelan *v.* Railroad Co., 35 F. R., 849, distinguished. Thouron *v.* East Tennessee, V. & G. R'y Co., 38 F. R., 673.

Since the inferior federal courts owe their existence and powers entirely to Congress, that body has full powers over them. The provision of the act of March 3, 1887, therefore, that the circuit court shall remand a cause removed on the ground of local influence and prejudice, when on application it has examined the affidavit and its grounds and not become satisfied that the removing party will not be able to obtain justice in the State court, is not, as regards pending causes, unconstitutional. Birdseye *v.* Shaeffer, 37 F. R., 821.

The fact that Congress has not given original jurisdiction to the circuit court in cases of local prejudice does not affect its jurisdiction on

REMOVAL FOR LOCAL PREJUDICE—*Right to Remove—continued.*

removal by the non-resident defendant. Whelan *v.* New York, L. E. & W. R. Co., 35 F. R., 849. But see Thouron *v.* East Tenn., etc., R. Co., 38 F. R., 673.

An order remanding cause after an inquiry as to the existence of local prejudice does not deprive the removing party of his property without due process of law, because after the order retaining the cause he had spent money in preparing for trial. Birdseye *v.* Shaeffer, 37 F. R., 821.

Under section 2, clause 4, providing for the removal of a cause for local influence in an action by a citizen of Ohio in an Ohio federal circuit court against three Ohio corporations and a New York corporation, to enforce a joint liability imposed by State statute for personal injuries sustained by plaintiff, the New York corporation is entitled to have the cause removed. Whelan *v.* New York, L. E. & W. R. Co., 35 F. R., 849. But see Thouron *v.* E. Tenn., etc., R. Co., 38 F. R., 673; Anderson *v.* Bowers, 43 F. R., 321, *contra.*

REMOVAL FOR LOCAL PREJUDICE—*Place and Time of Application.*

An application for removal from a State court on the ground of local prejudice must be made, and the question of fact tried in the federal court. Kaitel *v.* Wylie, 38 F. R., 865.

Under the clause relating to removal for "local prejudice or influence," the application must be made to the federal court, and may be made at any time before final hearing in the State court. Huskins *v.* Cincinnati, 37 F. R., 504.

Under the act of Congress of March 3, 1887, it is for the circuit court to determine whether or not the prejudice or local influence, for which a removal is sought, actually exists; and until that fact is made to appear no removal can be ordered. Overruling Fisk *v.* Henarie, 32 F. R., 417. Short *v.* Chicago, M. & St. P. R'y Co., 34 F. R., 225.

The application for removal for local prejudice is not too late, though made after the cause has been heard on demurrer in the State court and after issue joined; the words "any time before the trial" referring to the final trial on the merits. Whelan *v.* New York, L. E. & W. R. Co., 35 F. R., 849.

REMOVAL FOR LOCAL PREJUDICE—*Affidavit.*

Where it is sought to remove a case from a State court to a federal court on the ground of local prejudice, such local prejudice must be made to appear to the federal court by proof, by affidavit or otherwise, of facts showing such local prejudice. *In re* Penn. Co., 137 U. S., 451, overruling in effect Fisk *v.* Henarie, 32 F. R., 417; S. C., 13 Sawyer, 38; Hills *v.* Richmond, etc., R. Co., 33 F. R., 81; Whelan *v.* New York, etc., R. Co., 35 F. R., 849.

A mere formal affidavit by the defendant that he believes that he cannot obtain justice because of prejudice or local influence is not sufficient; but the fact that such prejudice or local influence exists must be shown to the court by oral testimony or by affidavit. Short *v.* Chicago, M. & St. P. R'y, 33 F. R., 114.

REMOVAL FOR LOCAL PREJUDICE — *Affidavit — continued.*

The defendant, a corporation of Wisconsin doing business in Minnesota, having been sued in the local courts of Minnesota by a citizen of that State, filed through its proper officer an affidavit for removal in the form prescribed by the act of Congress of 1867, viz., that he had reason to believe, and did believe, that by reason of prejudice and local influence he would not be able to obtain justice in that forum. *Held*, on motion to remand, that the affidavit was insufficient; the inability to obtain justice in the State tribunal for the reasons set out not being "made to appear to the circuit court" as required by the act of Congress of March 3, 1887. Short *v.* Chicago, M. & Ct. O. R'y Co., 34 F. R., 225.

The existence or non-existence of "prejudice or local influence" is not a jurisdictional fact involving a judicial investigation after notice to the adverse party, but may be properly shown by the *ex parte* affidavit of the defendant seeking the removal. Whelan *v.* New York, L. E. & W. R. Co., 35 F. R., 849.

By the act of 1887, unlike the former act, an application to remove for local prejudice must be made to the United States circuit court, and be supported by such proof as to satisfy the court of the truth of such allegations, and a case removed by the State court since the latter act took effect, upon such an affidavit as that prescribed by the former act, not showing that defendant could not obtain justice in some State court other than the one in which the action was instituted, to which he may, under the laws of the State, secure a change of venue, should, on motion of the plaintiff, be remanded to the State court. Southworth *v.* Reid, 36 F. R., 451.

The affidavit for removal must set forth facts and circumstances sufficient to satisfy the court of the existence of the prejudice and local influence; and an affidavit stating merely affiant's belief or opinion that prejudice or local influence exists is not sufficient. Amy *v.* Manning, 38 F. R., 868.

As the Illinois statute provides that a cause may be removed for local prejudice to some other court of competent jurisdiction in some other convenient county, to which there is no valid objection, the existence of prejudice is not sufficiently shown to justify removal to the federal court where the affidavit shows that the prejudice is confined mainly, if not entirely, to Cook county. Robison *v.* Hardy, 38 F. R., 49.

A petition for the removal of a cause under the local prejudice clause which alleges that petitioner cannot obtain justice in the trial court, nor in any other in the State to which the case could be removed, is insufficient in not alleging prejudice against the party seeking removal, or influence exerted by the adverse party, and the affidavit accompanying it should state the facts supporting such averments. Goldworthy *v.* Chicago, M. & St. P. R'y Co., 38 F. R., 769.

It is not sufficient that defendant swears positively that such prejudice, etc., exists so far as to render a fair trial in any State court impossible, without showing the facts on which the averment is based, as

REMOVAL FOR LOCAL PREJUDICE — *Affidavit — continued.*

the act mentioned is a substitute for the act of 1867, which only required the belief of the applicant in such prejudice to be shown. Amy *v.* Manning, 38 F. R., 536.

An affidavit that defendant has no acquaintance in the county in which the trial in the State court will be had; that plaintiff is well known there as a lawyer and politician, having lived and practiced law at the county seat many years, and having been a candidate for the office of attorney-general of the State, does not make a case for removal. Dennison *v.* Brown, 38 F. R., 535.

In an action by a foreign corporation for the price of lumber sold, defendant counter-claimed for services rendered, and for damages for breach of contract. In support of a petition for removal to the federal court plaintiff filed an affidavit signed by several citizens of the county in which defendant resided, stating in general terms that from prejudice and local influence the plaintiff could not obtain a fair trial in that county or in the judicial district. The facts stated in the affidavit were that defendant had a large and influential business connection in the county and district, and that the counties had had more or less litigation in their corporate capacity, which had excited a prejudice against non-resident corporations. This affidavit was controverted by one signed by numerous citizens of the vicinity. *Held*, that the petition would be denied. Carson & Rand Lumber Co. *v.* Holtzclaw, 39 F. R., 885.

An affidavit made by an agent for removal on account of prejudice, under the act of 1887, is insufficient which alleges that "I have reason to believe" in the existence of prejudice, and does not cause the prejudice to be made to appear to the court. Hakes *v.* Burns, 40 F. R., 33.

An affidavit filed in the federal circuit court, stating that affiant "has reason to believe, and does believe," that defendant will not be able to obtain justice in the State court, is not sufficient evidence of the fact to warrant a removal. Minnick *v.* Union Ins. Co., 40 F. R., 369.

Under the act of March 3, 1887, providing for the removal of causes on the ground of local prejudice, a petition for the removal, accompanied by an affidavit of a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, is sufficient to justify an order of removal. Cooper *v.* Richmond, etc., R. Co., 42 F. R., 697.

Under the act of March 3, 1887, in a case sought to be removed from a State court on the ground of local prejudice, defendant's affidavit showing that he might remove the case to any one of several counties adjoining that in which the suit was brought, although containing an averment in general terms that on account of local prejudice he will be unable to obtain justice in said courts, is insufficient. Rike *v.* Floyd, 42 F. R., 247.

The affidavit showing local prejudice and influence as ground for the removal of causes from the State to the federal courts, under the provisions of act of Congress of March 3, 1887, may be filed in

REMOVAL FOR LOCAL PREJUDICE — *Affidavit — continued.*

the State court, and certified copy thereof sent up to the circuit court. Short *v.* Chicago, M. & St. P. R'y, 33 F. R., 114; Short *v.* Chicago, etc., R. Co., 34 F. R., 225.

It is the duty of the circuit court to examine into the truth of the facts alleged to support the grounds for removal, and to ascertain their existence. The simple affidavit by the defendant, stating in general terms the existence of such prejudice, and its effect in the language of the statute,— no opportunity having been given the plaintiff, by notice, to controvert such statement,— ought not to be accepted as sufficient evidence of the fact. Malone *v.* Richmond & D. R. Co., 35 F. R., 625.

Where an affidavit for the removal of a cause on the ground of local prejudice is presented, the federal court will not permit the adverse party to traverse it, and will not hear evidence on the subject. Cooper *v.* Richmond, etc., R. Co., 42 F. R., 697. Erroneous?

REMOVAL FOR LOCAL PREJUDICE — *Practice in General.*

After the testimony was closed, and the case was awaiting the convenience of the master for final argument before him, the defendants applied, under section 2 of the act of 1887, to examine into the truth of the affidavit for removal, alleging that the same is untrue; on which issue affidavits were filed by the parties. *Held*, (1) that the proceeding authorized by the act of 1887, whereby this court is called upon to pass on the fitness of a State judge to try a particular case, is indelicate and inexpedient; (2) the application is too late, not having been made before the trial, or hearing commenced before the master; and (3) the cause was removable on the ground of the diverse citizenship of the parties, irrespective of the question of prejudice and local influence, and therefore the application to remand is denied, without passing on the same. Neale *v.* Foster, 31 F. R., 53.

Under the act of 1887, chapter 373, section 2, clause 4, providing "that a removal shall take place when it is made to appear to the circuit court that from prejudice or local influence it (defendant) will not be able to obtain justice" in the State courts, a plea by plaintiffs simply denying defendant's belief in the existence of such prejudice or local influence is insufficient, and raises no issue on that question, as the plea should affirm that it does not exist. County Court of Taylor County *v.* Baltimore & O. R. Co., 35 F. R., 161.

The existence of "local prejudice or influence" is not a jurisdictional fact, so as to entitle the adverse party to put it in issue for formal trial, and it is sufficient if it is made to appear to the federal court by petition and affidavit. Huskins *v.* Cincinnati, 37 F. R., 504.

An order setting aside another order remanding a cause to the State court, from which it had been removed on the ground of local prejudice, is not a final order, and the cause remains pending. Hence the provision of the act of March 3, 1887, for an inquiry into the question of local prejudice applies to a cause at such a stage when the act was passed. Birdseye *v.* Shaeffer, 37 F. R., 821.

REMOVAL FOR LOCAL PREJUDICE — *Practice in General — continued.*

Under the act of March 3, 1887, providing for a removal when it shall be made to appear to the circuit court that from prejudice or local influence defendant will not be able to obtain justice in the State court, the question whether there is no prejudice, etc., is open to inquiry, and may be determined from the evidence produced by both parties on motion to remand. Dennison *v.* Brown, 38 F. R., 535.

When a petition for removal has been granted on such sufficient affidavit, on motion to remand to the State court the circuit court will reconsider the sufficiency of the affidavit, and remand the case if not satisfied of the existence of prejudice or local influence. Amy *v.* Mannin, 38 F. R., 868.

Three days' notice is not a reasonable time to allow defendant an opportunity to contest the allegation of local prejudice before an order of removal is made by the federal court. Carson & Rand Lumber Co. *v.* Holtzclaw, 39 F. R., 578.

NO APPELLATE REVIEW OF REMANDING ORDERS.

In view of the provision in the acts of 1887 and 1888, abrogating appeals and writs of error to review orders of federal courts remanding causes to State courts, it is held that a review by the Supreme Court of such remanding orders by *mandamus* is also prohibited. *In re* Penn. Co. (1890), 137 U. S., 451.

Since the act of March 3, 1887, took effect the United States Supreme Court has no power to review on appeal or error an order of a circuit court remanding a cause to a State court. Morey *v.* Lockhart, 123 U. S., 56; Wilkinson *v.* Nebraska, 123 U. S., 286.

The last paragraph of section 2 governs all removed cases, not merely cases removed for local prejudice. *Id.*

If the order to remand a case to a State court was made while the act of March 3, 1875 (18 Stat., 470), was in force, but the writ of error to review it was not brought until after the amendatory act of March 3, 1887 (24 Stat., 552), went into effect, the United States Supreme Court cannot take jurisdiction of the writ. Sherman *v.* Grinnell, 123 U. S., 679.

The judiciary act of 1875, as amended in 1887 and 1888, provides that no appeal or writ of error shall lie to review an order of a circuit court remanding a cause to a State court, and 25 Stat., 693, February 25, 1889, allowing appeals and writs of error from the Supreme Court to review final judgments and decrees when the jurisdiction of the lower court is in issue, does not change the rule. A remanding order is not a final judgment. Richmond, etc., R. Co. *v.* Thouron, 134 U. S., 45.

Under the act of March 3, 1887, a judgment of a federal circuit court remanding a cause to a State court on the ground that the federal court has no jurisdiction of it, is not one which the Supreme Court can review by appeal or writ of error, although the circuit court also sustained a general demurrer to the declaration. The act of February 25, 1889, giving an appeal or writ of error from a final

NO APPELLATE REVIEW OF REMANDING ORDERS — *continued.*

judgment of a circuit court where a question of the jurisdiction of such circuit court is involved, does not apply to the present case, as a remanding order is not a final judgment within the meaning of the act. Gurnee *v.* Patrick County (1890), 137 U. S., 141.

Proceedings in State court.] § 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court;

Removal of suit as to title under grants from different States.] and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on

petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

As amended by act of August 13, 1888 (25 Stat., 433).

Removal — Attachments — Injunctions.] § 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced;

And all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal;

And all injunctions, orders, and other proceedings had in such court prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

Lack of jurisdiction — Suit dismissed or remanded to State court.] § 5. That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

The remainder of this section was repealed by the act of March 3, 1887 (24 Stat., 552). The repealed portion is as follows: But the order of said court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

When the record discloses a controversy of which a circuit court cannot properly take cognizance it should dismiss the suit, and its failure to do so is error which the United States Supreme Court will correct of its own motion when the case is brought before it for review. Morris *v.* Gilmer, 129 U. S., 315.

Under section 5 of the act of March 3, 1875 (18 Stat., 470), the United States Supreme Court will take notice of want of jurisdiction in the circuit court, although the point has not been formally raised either in the circuit court or in the Supreme Court. Graves *v.* Corbin, 132 U. S., 571, 590.

Where plaintiff's jurisdictional allegation as to the diverse citizenship of the parties is not traversed by defendant, no question concerning the capacity of the parties to litigate in a federal court can be raised before the jury. Deputron *v.* Young, 134 U. S., 241.

Objection to jurisdiction of court under section 5 of the judiciary act of 1875 should be raised at the first opportunity, and delay in making it should be considered in examining the grounds on which it rests. *Id.*

A suit cannot properly be dismissed by a federal court as not involving a controversy within its jurisdiction unless the facts appearing of record create a legal certainty of that conclusion. *Id.*

If the pleadings and evidence together show that the defendants are citizens of the United States and reside, in the sense of having their domicile, in the State of which plaintiffs are citizens, the suit must be dismissed for lack of jurisdiction. Anderson *v.* Watt, 138 U. S., 694.

Act of March 3, 1875, section 5, providing that a cause in the circuit court must be dismissed if at any time during its progress the court discovers it has no jurisdiction, does not mean that a suit, properly brought, must be dismissed because defendant, by admission or failure to deny, reduces the amount in dispute to less than the statutory sum. Fuller *v.* Metropolitan Life Ins. Co., 37 F. R., 163; Same Case, 24 Blatch., 548.

Rule 9 of the circuit court for California provides that "when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." *Held*, that neither the act of March 3, 1875, section 5, nor the rule authorizes a plea to the jurisdiction to be entered after answer to the merits, and after the commencement of taking testimony. Hewitt *v.* Story, 39 F. R., 158.

Under section 5 of the act of March 3, 1875, if a federal circuit court, after overruling a motion to remand a cause to a State court from which it had been removed on the ground that it involved a federal question, disposes of the only federal question in the case (*e. g.*, by sustaining demurrer to plea), a second motion to remand the cause to a State court is proper. Hamblin *v.* Chicago, B. & Q. R. Co., 43 F. R., 401. But see decisions below *contra*.

The jurisdiction of the federal courts, which has once attached by reason of diverse citizenship, is not divested by a subsequent transfer of the cause of action by which the controversy becomes one between citizens of the same State. Jarboe *v.* Templer, 38 F. R., 213.

A horse-car company, claiming to have an exclusive franchise in Omaha, Nebraska, of which State it was a resident, sought in the federal courts to enjoin a cable company, also a resident of that State, from laying its tracks in Omaha, on the ground that the act incorporating the cable

company was a State law impairing the obligation of contracts. The court held that the exclusiveness of the plaintiff's franchise was limited to a mere horse railway, but the constitution of the State forbidding the damaging, as well as the taking, of private property for public use without compensation therefor, referred the case to commissioners to report what damage, if any, the plaintiff would suffer by the laying of the cable line. *Held*, that a real, substantial federal question having been involved in the case at the outset, the elimination of that question did not oust the court of jurisdiction of the question of damages. Omaha Horse R'y Co. *v.* Cable Tram-way Company of Omaha, 32 F. R., 727.

Defect of jurisdiction appearing in the petition or declaration may be taken advantage of by demurrer, in the absence of a general appearance by defendant. Myer *v.* Herrera, 41 F. R., 65.

Where the petition shows on its face that the court has not jurisdiction of the cause, the action may be dismissed on motion. The objection need not be first raised by demurrer. Connor *v.* Vicksburg & M. R. Co., 36 F. R., 273.

C., a judgment creditor, and also the purchaser of land under an execution sale, conveyed the same to M., his son-in-law, a non-resident, for an interest in a worthless patent. Subsequent to his agreement to convey, he endeavored to obtain possession of the land by proceedings, in which he swore that he was the owner, and entitled to possession. The grantee never saw the land, never examined the title or inquired as to its value, and took no part in the suit brought in his name to set aside a fraudulent deed made by the judgment debtor. *Held*, that the conveyance was collusive, and the court had no jurisdiction. McLean *v.* Clark, 31 F. R., 501.

Held, that O. P. was the real party in interest, the transfers from him being colorable merely, and that the suit should be dismissed, the actual plaintiff and the defendant being both residents of Maine. Norton *v.* European & N. A. R'y, 32 F. R., 865.

The court will not inquire, on a motion to remand a case to the State court, either as to the truth of the allegations in the pleadings, or the sufficiency of the complaint or bill as such, or whether it states a good cause of action. These matters are for the decision of the court which finally tries the case. Hax *v.* Gaspar, 31 F. R., 499.

A party against whom a case has been removed from a State to a national court may contest any allegation of fact on which such removal was had, by a plea in the nature of a plea to the jurisdiction of the latter court; and this whether such allegation is contained in the pleadings proper or the petition for removal. McDonald *v.* Salem Capital Flour-Mill Co., 31 F. R., 577.

Where, on application by a defendant in a suit in a State court to remove the cause to the United States circuit court, the State court, being of competent jurisdiction, has decided that on the face of the record the defendant is not entitled to such removal, he will not be permitted to contend for a contrary decision of the same point in the circuit court, upon a motion by plaintiff to remand the cause as not being removable. Beadleston *v.* Harpending, 32 F. R., 644.

A plea to the jurisdiction that one of the parties to the case is a citizen of a State other than that alleged in the petition for removal need not be supported by an answer. McDonald *v.* Salem Flour-Mill Co., 31 F. R., 577.

Plaintiff commenced suit in the New York supreme court to establish a will as a will of real estate. One of the defendants removed the cause into the United States circuit court for the southern district of New York, but did not enter the record. *Held*, that plaintiff could, without leave, enter a copy of the petition, order and bond, and move to remand the cause under a rule of the circuit court adopted October 1, 1883, which provides that, when a cause has been removed from a State court, either party may, forthwith, cause a copy of the record to be filed in the circuit court. Anderson *v.* Appleton, 32 F. R., 855.

Where the question is as to the right of removal from a State to a federal court, and not as to mere defects in the proceedings for removal, lapse of time and the taking of preliminary proceedings after removal are not a waiver of the right to a remand. Bronson *v.* St. Croix Lumber Co., 35 F. R., 634.

The plaintiff does not waive his right to remand a cause on the ground that it does not contain a separable controversy by once obtaining a continuance in the federal court, as the question is jurisdictional. Southworth *v.* Reid, 36 F. R., 451.

Under the removal acts of 1875 and 1877, section 3, requiring the party removing the cause to give bond for entering in the United States circuit court, on the first day of its next session, a copy of the record, and for appearing and entering bail, etc., and providing that, such being entered, the cause shall proceed as if it had been commenced there, the United States circuit court has no power to remand a cause so removed, for want of jurisdiction prior to the return-day, that being the next regular term after the removal. Kansas City & T. R'y Co. *v.* Interstate Lumber Co., 36 F. R., 9.

A cause will not be remanded on the ground that there is ample remedy at law and the suit was brought in equity, as the averments being that complainants are owners of an undivided two-thirds and that defendants are in possession of the whole tract, a suit in equity was necessary; also, if this were not so, the cause being brought properly in equity under the State statute, the pleadings could be reformed and the cause transformed into an action at law; and again, if this were not allowed, the bill would be dismissed rather than the cause remanded. Bacon *v.* Felt, 38 F. R., 870.

Though the law of Congress relating to the removal of causes provides that the removing party shall file a bond to enter the case in the circuit court on the first day of the next session, and that, the record being so entered, the cause shall proceed as if begun in the circuit court, the other party may file a transcript of the record at an earlier day, and have the case remanded, if it appears upon the face of the record that it was not authorized to be removed. Mills *v.* Newell, 41 F. R., 529.

A defendant who has a suit removed from a State court on the ground that the plaintiffs are citizens of a different State from all the defendants but

one, and that such defendant is only a nominal party, cannot resist a motion to remand on the ground that the removing defendant is the real party plaintiff, the controversy being between him and the other defendants, who are citizens of different States. Mayer *v.* Denver, T. & Ft. W. R. Co., 41 F. R., 723.

Where defendant's petition for removal of a cause distinctly alleges that a federal question is raised, his answer, filed after a motion to remand, and setting out more in detail the nature of the defense, may properly be considered on that motion. Kentucky *v.* Louisville Bridge Co., 42 F. R., 241.

Removal — Practice after.] § 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

The proviso in section 6 of the amendatory act of March 3, 1887, relates only to the jurisdiction of federal circuit courts, not to the appellate jurisdiction of the United States Supreme Court. That court has no jurisdiction to hear an appeal from an order of a circuit court remanding a cause to a State court, although the cause was begun and removed to a federal court before the act of 1887 took effect. Wilkinson *v.* Nebraska, 123 U. S., 286.

The proviso in section 6 of the act of March 3, 1887, excepting pending cases from the operation of the act, relates only to the jurisdiction of federal circuit courts, and does not confer on the United States Supreme Court jurisdiction over a writ of error from a judgment of a federal circuit court remanding a cause to a State court, when the suit was begun and removed before the act of 1887 took effect, but not remanded until afterwards. Gurnee *v.* Patrick County (1890), 137 U. S., 141.

Removal — Practice as to.] § 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf;

That if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to

which said action, or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the circuit court to which any cause, shall be removable under this act shall have power to issue a writ of *certiorari* to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law;

And if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding;

But if said order shall be complied with, then said circuit court shall require the other party to plead, and said action, or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditional as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

Suit to enforce possession, etc.—Service by publication.] § 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be;

Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks;

And in case such absent defendant shall not appear, plead,

answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon the proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district;

But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district,

And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State:

Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

By section 5 of the amendatory acts of March 3, 1887, and August 13, 1888, *post*, this section is expressly continued in force.

This section is an extension of Revised Statutes, section 738, and relates to the same subject-matter.

Suit to remove incumbrance held properly brought under section 8 of the act of March 3, 1875 (18 Stat., 470). Mellen *v.* Moline, etc., Iron Works, 131 U. S., 352.

Under the act of March 3, 1887, a suit by a citizen of Ohio against citizens of Vermont, New York and Maine, to enforce claim to property in Vermont, is properly brought in the district of Vermont. Carpenter *v.* Talbot, 33 F. R., 537.

Under the act of March 3, 1875, section 8, which is expressly left in force by the amendatory act of August 13, 1888, a circuit court has jurisdiction of a suit by resident of another district to foreclose a mortgage on the land, when some of the defendants are, and others are not, resident of the district in which the suit is brought. Ames *v.* Holdenbaum, 42 F. R., 311.

The specific prayers of the bill being (1) for an account of lumber, etc., taken from demised premises; (2) for damages for defendant's breaches of covenant; (3) for the appointment of a receiver of demised premises, lumber, etc., *held*, that the suit was not one within the contemplation of section 8. Ellis *v.* Reynolds, 35 F. R., 394.

An alien bondholder of a railroad company to restrain the trustee in a mortgage securing the bonds from paying over to the company, in fraud of plaintiff's rights, the proceeds of the sale of land which, by the mortgage, was set apart to create a sinking fund for the redemption of the bonds, is within the saving clause of the act of 1887, and when the action was commenced within the district of which the trustee was an inhabitant, and in which it had the fund, an order may issue to the company, a non-resident corporation, to appear and plead. Pollitz *v.* Farmers' Loan & Trust Co., 39 F. R., 707.

By the act of March 3, 1887, the right given by the eighth section of the act of March 3, 1875, to bring in non-residents by publication in certain cases is expressly continued. American F. L. M. Co. *v.* Benson *et al.*, 33 F. R., 456.

Death of party — Substitution of representative.] § 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid.

The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done.

If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

See rule 15 of the United States Supreme Court, *post*, on the same subject.

Repeal.] § 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

For sections 2–7, inclusive, of the amendatory act of August 13, 1888, which do not directly amend the act of March 3, 1875, see statute No. 13, *post*.

No. 4.

AN ACT to provide for the appointment of commissioners for taking affidavits, etc., for the courts of the United States. Approved August 15, 1876. 19 Stat., 206.

Notaries — May take depositions, acknowledgments, etc.] *Be it enacted*, etc., That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of

the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do.

See Revised Statutes, section 1778, which provides that notaries may administer oaths in cases in which justices of the peace may do so.

The statutes of the United States confer on notaries public no general authority to administer oaths. United States *v.* Hall (1889), 131 U. S., 50.

The act of August 15, 1876 (19 Stat., 206), does not authorize a notary public to swear an officer of a national bank to his report made under Revised Statutes, section 5211. United States *v.* Curtis, 107 U. S., 671.

For statute authorizing a notary public to administer an oath to a bank officer, see act of February 26, 1881. 21 Stat., 352.

No statute of the United States authorizes a notary public to administer an oath to a deputy surveyor of the United States in regard to the manner in which he executed a contract for surveying public land. United States *v.* Hall (1889), 131 U. S., 50.

Defendant was charged before a State court with perjury in having testified falsely before a notary public in a proceeding under Revised Statutes, chapter 8, title 2, regulating the taking of testimony in a contest for a seat in the house of representatives of the United States. *Held*, that the offense is cognizable only by the federal courts, under Revised Statutes, section 5392, providing for the punishment of perjury in any case in which the laws of the United States authorize an oath to be administered, and the second section of the judiciary act of August 13, 1888, giving the United States courts exclusive cognizance of all crimes cognizable under the authority of the United States. *In re* Loney, 38 F. R., 101.

A statute (20 Stat., 30) which provides that a defendant charged with crime shall at his own request, but not otherwise, be a competent witness, does not render competent a defendant who by previous conviction of an infamous crime has lost the privilege of testifying. United States *v.* Hollis, 43 F. R., 248.

No. 5.

AN ACT to make persons charged with crimes and offenses competent witnesses in the United States and Territorial courts. Approved March 16, 1878. 20 Stat., 30.

Accused is competent witness.] *Be it enacted*, &c., That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness.

And his failure to make such request shall not create any presumption against him.

No. 6.

AN ACT making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirteenth, eighteen hundred and seventy-nine, and for prior years, and for those heretofore treated as permanent, and for other purposes. Approved March 3, 1879. 20 Stat., 410.

Clerk of court not to be appointed receiver or master, except.] (PAR. 2.) No clerk of the district or circuit courts of the United States or their deputies shall be appointed a receiver or a master in any case except where the judge of such court shall determine that special reasons exist therefor to be assigned in the order of appointment.

No. 7.

AN ACT regulating fees and the practice in extradition cases. Approved August 3, 1882. 22 Stat., 215.

Subpœna for defendant's witnesses.] § 3. That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpœnaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States.

Fees to be paid by Secretary of State.] § 4. That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.

Documentary evidence for petitioner.] § 5. That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and ad-

mitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act.

Section 5 of 22 Stat., 216, chapter 378, applies only to papers or copies thereof which are offered in evidence by the prosecution to establish the criminality of the person apprehended, and does not apply to documents or depositions offered on the part of the accused. The accused can produce oral evidence. *In re* Cortes, Petitioner, 136 U. S., 330.

No. 8.

AN ACT regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories. Approved March 3, 1885. 23 Stat., 443.

Matter in dispute must exceed $5,000.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

Section 15 of the act of March 3, 1891, *ante*, provides for the review of judgments of the supreme courts of the Territories by circuit courts of appeals in certain cases.

Exceptions to foregoing.] § 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute.

This section is modified by section 15 of the act of March 3, 1891, *ante*.

The decision of a supreme court of a Territory asserting the power of the Territorial governor to make appointments to Territorial offices puts in issue an authority exercised under the authority of the United States within the meaning of section 2 of the act of March 3, 1885 (23 Stat., 443). Clayton *v.* Utah Territory, 132 U. S., 632.

Under act of March 3, 1885 (23 Stat., 443), allowing an appeal from the supreme court of a Territory to the United States Supreme Court in any case in which is drawn in question the validity of an authority exercised under the United States, a *mandamus* suit in a Territorial court by a member and presiding officer of a Territorial legislature against the custodian of the legislative records to compel him to assist in correcting them to make them speak the truth, involving the right of certain persons to be a Territorial legislature, may be removed to the United States Supreme Court, such right being an authority exercised under the United States. Clough *v.* Curtis (1890), 134 U. S., 361.

Under 23 Stat., 443, chapter 355, an application for a *mandamus* to compel an auditor and comptroller to audit relator's claim, and to issue a warrant therefor, does not draw in question the validity of an authority exercised under the United States. United States *v.* Lynch, 137 U. S., 280.

No. 9.

AN ACT to regulate commerce. Approved February 4, 1887. 24 Stat., 379. As amended by 25 Stat., 855, March 2, 1889, and 26 Stat., 743, February 10, 1891.

Interstate commerce regulations — Not applicable to traffic wholly within one State — "Railroad," "Transportation," defined — Charges to be reasonable.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any

railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Special rates and rebates prohibited.] § 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Undue preferences prohibited — Equal facilities to connecting lines — Terminal facilities.] § 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Shorter distance charges not to be more than for longer — Commissioners may authorize exception.] § 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of pas-

sengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Pooling of freights or earnings prohibited.] § 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case if an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Common carriers to print and post schedules—Contents.] § 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

Schedules of freight through foreign countries—To pay duty on failure to post.] Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in

the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

Notice of advances — Notice of reductions.] No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

Unlawful to deviate from schedules.] And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Copies to be filed with commission — Joint tariffs of rates — To be made public.] Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common

carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carrier to publish, and the places in which they shall be published.

Advances in joint rates—Reductions in joint rates.] No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

Deviations unlawful.] It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

Form of schedules.] The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

Proceedings on failure to file or publish schedules—Writ of mandamus to issue—Failure to comply punishable as contempt—Injunction to issue.] If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of *mandamus*, to be issued by any circuit court

of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

As amended by 25 Stat., 855, March 2, 1889.

Combinations to prevent continuous carriage of freight to destination prohibited.] § 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Liability for violations of this act.] § 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery which

attorney's fee shall be taxed and collected as part of the costs in the case.

Persons damaged may make complaint to Commission, or sue personally.] § 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Penalty for violation — Fine — Imprisonment for unlawful discrimination.] § 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore pro-

vided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Punishment for false billing, classification, weighing.] Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Punishment of shipper falsely billing.] Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

Punishment of shipper for inducing discriminations.] If any such person, or any officer or agent of such corporation or company, shall, by payment of money or other thing of value, solicitation or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent

of such corporation or company, shall be deemed guilty of misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

As amended by 25 Stat., 855, March 2, 1889.

Interstate Commerce Commission created — Appointment — Term — Removal — No person pecuniarily interested in interstate common carriers eligible.] § 11. That a commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

Duties of commission — Costs — Prosecutions — Power to send for persons and papers.] § 12. That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable

the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the attorney-general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Attendance of witnesses.] Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Circuit courts to issue order for attendance of witness — Punishment for contumacy — Self-criminating testimony.] And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Testimony by deposition — Notice — Compulsion.] The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any

stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Oath and signature of deponent.] Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Depositions in foreign countries.] If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing to be filed with the commission. All depositions must be promptly filed with the commission.

Fees for depositions.] Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

As amended by 26 Stat., 743, February 10, 1891. This amendment supersedes the amendment of this section made by 25 Stat., 855, March 2, 1889.

Petitions to Commission as to violations of this law — Charges to be forwarded to common carrier — Investigation if complaint is not satisfied — Investigation of complaints by railroad commissions of States — Lack of direct damage not to dismiss complaint.] § 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to

the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Written reports of investigations to be made.] § 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

Record copy.] All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Publishing reports and decisions.] The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

As amended by 25 Stat., 855, March 2, 1889.

Notice to common carrier of violation — Record to be made if violation has ceased or reparation made.] § 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Proceedings in circuit courts for violations of this act or disobeying order of Commission — Court to hear on short notice — Pleadings — Report of Commission prima facie as to facts — Injunction — Attachment on disobeying process — Fine — Appeals to Supreme Court — District attorney to prosecute.] § 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall

direct; and said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any

writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Proceedings in matters requiring jury trial — Order for trial — Practice — Summoning jury — Waiving jury — Appeal — Costs — Circuit courts to be always in session.] If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or

attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

As amended by 25 Stat., 855, March 2, 1889.

Conduct of proceedings of Commission — Record of votes and acts — Subpœnas.] § 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpœnas.

As amended by 25 Stat., 855, March 2, 1889.

Salaries — Commission to appoint employees — Offices — Witnesses.] § 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Expenses.] All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than the City of Washington, shall be allowed and

paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

As amended by 25 Stat., 855, March 2, 1889.

Sessions.] § 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Annual reports to Commission from common carriers — Details — May prescribe uniform system of accounts.] § 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Annual report of Commission to be made direct to Congress — List of employees.] § 21. That the Commission shall, on or before the first day of December in each year,

make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

As amended by 25 Stat., 855, March 2, 1889.

Exceptions to provisions of the act — Extension — Officers and employees — Pending litigation.] § 22. That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing by common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act.

As amended by 25 Stat., 855, March 2, 1889.

Appropriation.] § 23. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June thirtieth, Anno Domini eighteen hundred and eighty-eight, and the intervening time anterior thereto.

Commission to be appointed and organized at once — Law to take effect in sixty days.] § 24. That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the Commission

herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

The amendatory act, 25 Stat., 855, March 2, 1889, contains an additional section, as follows:

Circuit and district courts may issue mandamus to compel equal facilities to shippers — Mandamus may issue pending determination — Other remedies not excluded.] § 10. That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of *mandamus* against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory *mandamus* may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, that the remedy hereby given by writ of *mandamus* shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

AN ACT to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases. Approved August 8, 1890. 26 Stat., 313.

Intoxicating liquors made subject to laws of State — Original packages not exempt.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

No. 10.

AN ACT to provide for the bringing of suits against the Government of the United States. Approved March 3, 1887, 24 Stat., 505.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

Suits against the Government — Jurisdiction of the Court of Claims — "War" and rejected claims excepted.] First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Set-offs — Counter-claims — Limitation.] Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

District and circuit courts to have concurrent jurisdiction with Court of Claims — Limit.] § 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

The act of March 3, 1887 (24 Stat., 505), does not confer upon the circuit or district courts or upon the court of claims jurisdiction in equity to compel the issue and delivery of a patent for public land. United States *v.* Jones, 131 U. S., 1.

Petitions for release from official bond — Judgment — Limitation.] § 3. That whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and adjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney-General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

Jurisdiction and procedure.] § 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

Petition for settlement of claims.] § 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such pe-

tition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

Service — Defense — Proceedings on failure of government to answer.] § 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

Opinions.] § 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

Interested parties may testify.] § 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the Government.

Repeal.] Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act.

Appeals and writs of error — Procedure.] § 9. That the plaintiff or the United States, in any suit brought under

the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

The right of appeal given by this section is probably modified by sections 5 and 6 of the act of March 3, 1891, *ante*.

Under the act of March 3, 1887 (24 Stat., 505), an appeal on the part of the United States lies to the Supreme Court from a judgment of a district court against the United States, rendered in the exercise of the jurisdiction conferred by said statute, without regard to the amount of the judgment. The United States has the same right of appeal as from a decision of the court of claims. United States *v.* Davis, 131 U. S., 36.

Adverse judgment to the United States to be certified to Attorney-General — Appeal — Limitation — Interest.] § 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

Report to Congress.] § 11. That the Attorney-General shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered giving the date of each, and a statement of the costs taxed in each case.

Claims referred by Departments.] § 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of

Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

Claims referred under "Bowman act"—Judgment.] § 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government," approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.

Reference of claims pending in Congress—Report to Congress.] § 14. That whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the act approved March third, eighteen hundred and eighty-three, entitled an "Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government," and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

Costs.] § 15. If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses and for summoning the same, and fees paid to the clerk of the court.

Inconsistent laws repealed.] § 16. That all laws and parts of laws inconsistent with this act are hereby repealed.

No. 11.

AN ACT to authorize condemnation of land for sites of public buildings, and for other purposes. Approved August 1, 1888. 25 Stat., 357.

Condemnation — Jurisdiction of federal courts.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

Procedure.] § 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

Act of August 1, 1888, authorizing designated government officers to acquire for the United States, by condemnation, real estate for the erection of public buildings and conferring upon the United States circuit and district courts jurisdiction of the condemnation proceedings, is not void as in conflict with the Constitution of the United States, amendment 5, declaring that private property shall not be taken for public use without just compensation, by its omission to provide for compensation to the owner, as the act must be read with the Constitution, and the courts will not award process of condemnation unless compensation be provided for. *In re* Rugheimer, 36 F. R., 369.

No. 12.

AN ACT to regulate the liens of judgments and decrees of the courts of the United States. Approved August 1, 1888. 25 Stat., 357.

Lien of judgment of federal court.— Docketing federal judgment in State office.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That judgments and decrees rendered in a circuit or district court of the United States within any

State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: *Provided*, That, whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

This section supersedes R. S., § 967

Clerk to keep judgment docket.] § 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

Judgment of federal court need not be docketed in county where rendered.] § 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county.

No. 13.

AN ACT to correct the enrollment of an act approved March third, eighteen hundred and seventy-eight, entitled "An act to amend sections one, two, three, and ten of act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March third, eighteen hundred and seventy-five." Approved August 13, 1888. 25 Stat., 433.

The first section of this act amends sections 1, 2 and 3 of the act of March 3, 1875 (*ante*, p. 20), and is printed there as the first three sections of that act.

Receiver shall manage property according to local law.] § 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any

receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

A suit was brought in the United States circuit court for Ohio for the foreclosure of a mortgage on defendant's railroad, which extends through Ohio and West Virginia. After the appointment of a receiver in that suit, complainant filed a bill termed an "ancillary bill," in the United States circuit court for West Virginia, reciting the proceedings in the first suit, and exhibiting a copy of the bill therein, and praying the court to take "ancillary jurisdiction" and furnish such relief as might be necessary to accomplish the purposes of the first suit, "and for such other and further relief as the nature of the case may require," etc. *Held*, that the bill should be dismissed. If the aid of the court in West Virginia is desired in enforcing the mortgage, it must be invoked by an independent suit. Mercantile Trust Co. *v.* Kanawha & O. R'y Co., 39 F. R., 337.

Receiver may be sued without leave — Court appointing receiver to retain control.] § 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

Quære, Does the last sentence of this section repeal *pro tanto* Revised Statutes, section 720, forbidding a federal court to grant an injunction to stay proceedings in a State court. The Supreme Court uses language in discussing the jurisdiction of district courts under the Ship-owners' Liability Act which tends to support the right of a federal court appointing a receiver to control suits against him. Providence, etc., Co. *v.* Hill Mfg. Co., 109 U. S., 578, 599, 600.

Where receivers of a railroad running through Arkansas, who were appointed in that State, had removed into another State, *held*, that the court would authorize them to be sued in the State courts of Arkansas by service on their station agents or clerks therein. Central Trust Co. of N. Y. *v.* St. Louis, A. & T. R'y Co., 40 F. R., 426.

Under section 3 of the act of March 3, 1887, known as the "Judiciary Act," *held*, that a judgment rendered in an action in a State court against a receiver appointed in an action in a federal circuit court instituted prior to the passage of the act, and which suit in the State court had been brought without the consent of the court appointing such receiver, was not conclusive as against him, but was subject to the equity jurisdiction of the court appointing him. Missouri Pac. R'y Co. *v.* Texas Pac. R'y Co., 41 F. R., 311.

A suit in a State court against a receiver appointed by a federal court, brought without leave of the federal court, is removable to a federal circuit court, since it involves a federal question, *i. e.*, the construction of the provisions of the amendatory act of March 3, 1887, permitting a suit in a State court against a receiver appointed by a federal court. Evans *v.* Dillingham, 43 F. R., 177.

United States circuit courts are not invested with appellate or supervisory jurisdiction over State courts. This rule is not affected by section 3 of the act of August 13, 1888. Central Trust *v.* St. Louis R. Co., 41 F. R., 551.

Suits by or against national banks.] § 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

See Revised Statutes, section 563, subsection 3, giving district courts jurisdiction "of all suits for penalties and forfeitures incurred under any law of the United States;" Revised Statutes, section 629, subsection 10, which gave circuit courts jurisdiction "of all suits by or against any banking association established in the district for which the court is held under any law providing for national banking associations;" Revised Statutes, section 5237, providing for enjoining the comptroller from continuing a receivership of a national bank; Revised Statutes, section 5239, providing for suit by comptroller to forfeit the franchises of a national bank; 19 Stat., 63, June 30, 1876 (R. S. Sup., 216), authorizing appointment of receivers of national banks; and 22 Stat., 162, July 12, 1882, to enable national banks to extend their corporate existence, which contained in its fourth section provisions substantially the same as those in the text.

A receiver of a national bank may still maintain a suit in the United States circuit court, without reference to the citizenship of the parties or to the amount involved, to recover a claim due to the bank. Armstrong *v.* Trautman, 36 F. R., 275.

The federal courts have the same jurisdiction of suits by and against the "agents" of national banks appointed under the national banking acts of Congress, when the "receivers" of an insolvent bank have been displaced by such "agents," as they have of suits by and against the "receivers" of such banks, each being in the same sense officers of the United States, and each representing in precisely the same relation the bank in its corporate capacity; and this jurisdiction attaches without regard to any diversity of citizenship of the parties or the amounts involved. McConville *v.* Gilmour, 36 F. R., 277.

The United States circuit court has exclusive jurisdiction of the prosecution of an officer of a national bank for embezzling the funds of such bank, under Revised Statutes, section 5209, declaring that an officer of a national bank who embezzles its funds shall be punished by imprisonment, and under the judiciary act declaring that the jurisdiction of the circuit courts of the United States shall be exclusive in the trial of all crimes or offenses against the laws of the United States, except where it is otherwise provided. United States *v.* Buskey, 38 F. R., 99.

Under the act of August 13, 1888, section 4, the federal courts have jurisdiction of an action between a national bank located in one State, and a citizen of another State. First National Bank *v.* Forest, 40 F. R., 705.

Under Revised Statutes, section 563, subdivision 4, which gives the district courts jurisdiction of "all suits at common law brought by the United States, or by an officer thereof authorized by law to sue," the district court has jurisdiction of an action to enforce the liability of a stockholder in an insolvent national bank, brought by the receiver appointed for the bank by the comptroller of the currency. Such jurisdiction is not taken away by act of July 12, 1882, section 4, and act of August 13, 1888, section 4, which take away the special jurisdiction of the district courts over suits in which a national bank is a party. Stephens *v.* Bernays, 41 F. R., 401.

Under the act of August 13, 1888, section 4, and Revised Statutes, section 563, a district court has no jurisdiction of an action on a promissory note brought by a national bank in a district other than that in which the bank is located. District courts have no jurisdiction on the ground of diverse citizenship. Farmers' National Bank *v.* McElhinney, 42 F. R., 801.

A suit to recover property acquired by the removing defendant as receiver of a national bank by authority of the laws of the United States arises under the laws of the United States within the meaning of the removal act of August 13, 1888. Sowles *v.* Witters, 43 F. R., 700.

Jurisdiction saved.] § 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

Revised Statutes, sections 641, 642, 643, relate to the removal from a State to a federal court of both criminal and civil cases, against persons denied any civil right, against civil or military officers for any act done or omitted under color of any civil rights law, against revenue officers and others acting or holding property under a revenue law, and against persons acting under federal registration laws.

Revised Statutes, section 722, and title 24, and the act of March 1, 1875,

confer original jurisdiction on circuit and district courts of certain classes of criminal and civil suits in vindication of civil rights.

Section 8 of the act of 1875 provides for service by publication on nonresident defendants in suits to enforce or to cancel a claim to real or personal property within the district.

Revised Statutes, section 644, providing for the removal of a suit brought by an alien in certain cases, although not mentioned in this section, is apparently consistent with the act of 1875, as amended in 1887 and 1888, and probably remains in force.

Revised Statutes, section 639, clause 1, relating to the removal of causes from State courts, is not expressly repealed by the act of 1875 or by the act of 1887.

Repeal.] § 6. That the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

Subsection 2 of Revised Statutes, section 639, relating to the removal of causes from State courts, was repealed by the act of March 3, 1875, as originally enacted. King *v.* Cornell, 106 U. S., 395.

Subsection 3 of Revised Statutes, section 639, which is the local prejudice removal act of 1867, was repealed by implication by the act of March 3, 1887. Minnick *v.* Ins. Co., 40 F. R., 369. It was not repealed by the act of March 3, 1875, as originally enacted. Hess *v.* Reynolds, 113 U. S., 73.

Relative of judge not to be employed in court.] § 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

No. 14.

AN ACT to abolish circuit court powers of certain district courts of the United States, and to provide for writs of error in capital cases, and for other purposes. In force February 6, 1889. To take effect May 1, 1889. 25 Stat., 655.

Writ of error from supreme court in capital case.] § 6. That hereafter in all cases of conviction of crime, the punishment of which provided by law is death, tried before any

court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed, to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.

Section 5 of the act of March 3, 1891, provides for an appellate review by the Supreme Court of decisions of circuit and district courts in cases of a conviction of a capital or otherwise infamous crime.

Rule 35 of the United States Supreme Court, *post*, regulates the practice under this statute.

§ 7. That this act shall take effect and be in force from and after the first day of May, *Anno Domini* eighteen hundred and eighty-nine.

Received by the President January 25, 1889.

NOTE BY THE DEPARTMENT OF STATE.— The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.

No. 15.

AN ACT to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the question of the jurisdiction of the courts below. Approved February 25, 1889. 25 Stat., 693.

Appeal to Supreme Court on question of jurisdiction.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals except as provided in the next following section.

See rule 32 of the United States Supreme Court, regulating the practice under this statute, *post*.

See section 5 of the act of March 3, 1891, *ante*.

Under 25 Stat., 693, February 25, 1889, an appeal does not lie from an order of a federal circuit court remanding a cause to a State court, such order not being a final judgment or decree within the meaning of that statute. Richmond, etc., R. Co. *v.* Thouron, 134 U. S., 45.

§ 2. That in cases of judgments or decrees mentioned in the first section of this act, and heretofore rendered, where the period of limitation for taking writs of error or appeals in other cases has not expired, appeals or writs of error may be sued out at any time within one year after the passage of this act.

CHAPTER 3.

JURISDICTION OF FEDERAL COURTS.

Sections.

1. Sketch of federal courts.
2. The judicial power of the United States.
3. Jurisdiction of circuit courts over suits by and against the United States.
4. Jurisdiction of circuit courts over suits by and against a State.
5. Original jurisdiction of circuit courts over suits between private parties.
6. Jurisdiction by removal of suits between private parties.
7. Jurisdiction of circuit courts of appeals.
8. Jurisdiction of the United States Supreme Court.

SECTION 1. **Sketch of federal courts.** According to the plan, which was put in operation by the judiciary act of 1789, and which has been continued in force ever since, the States of the Union are each divided into one or more districts, which never cross State lines. In each district there are two federal courts of original jurisdiction, a circuit court and a district court, except where the powers of a circuit court are conferred on the district court for the district. From the time when these courts were established the circuit courts have had confided to them, to the exclusion of the district courts, much of the original jurisdiction over suits between private parties, which Congress could bestow, and nearly all such jurisdiction it has seen fit to have exercised, excepting admiralty jurisdiction, which has been reserved equally carefully to the district courts. The jurisdiction of circuit courts over suits between private parties, both original and by removal from State courts, embraces, 1, jurisdiction founded on the character of the parties — a jurisdiction, which they exercise concurrently with the State courts — and 2, jurisdiction founded on the presence of a federal question, namely, one arising under the constitution, laws and treaties of the United States. The jurisdiction over suits between private parties conferred on circuit courts in 1789 by the judiciary act was much extended after the war of the Rebellion, in 1866, 1867 and 1875,[1] and was again curtailed in 1887 by the amendment of the act of 1875.[2] Still this jurisdiction, as it is left by the amendatory act of 1887, is considerably wider than it was by the act of 1789. The circuit courts have general jurisdiction of criminal and civil suits by the

[1] See particularly the removal acts passed during those years.

[2] See *ante*, ch. 2, Statute No. 3.

United States, with a few exceptions, and jurisdiction of suits by private persons against the United States to enforce claims exceeding $2,000 and not exceeding $10,000, of such a nature that they could be enforced in the court of claims.[1] The appellate jurisdiction which the circuit courts have heretofore exercised over the district courts will cease after July 1, 1891.[2]

District courts have jurisdiction of all civil suits in admiralty. Their jurisdiction over suits either expressly or virtually between private parties is not wholly confined, however, to their admiralty jurisdiction. They have jurisdiction of particular classes of cases between private parties, dependent on the subject-matter, *e. g.*, under the Interstate Commerce Act, *ante*, chapter 2, and they had such jurisdiction under the bankruptcy act, now repealed. District courts have no jurisdiction founded on the diverse citizenship of the parties, and no jurisdiction by removal of suits from State courts. They have jurisdiction of prosecutions for minor crimes against the United States, of suits to enforce forfeitures of property, and of civil suits by the United States at common law and in some cases in equity.

The Supreme Court of the United States, the only federal court expressly provided for in the federal constitution, in addition to the limited original jurisdiction conferred upon it directly by the people through the instrumentality of that instrument, has such appellate jurisdiction as Congress prescribes from time to time. It was the sole appellate federal court within the States — with the exception of circuit courts exercising appellate jurisdiction in certain cases over district courts, consular courts, courts held abroad by foreign ministers and executive department boards — from the formation of the government in 1789 until the appellate courts act took effect March 3, 1891. Besides appellate jurisdiction over inferior federal courts, the Supreme Court has conferred upon it by the judiciary act of 1789 appellate jurisdiction over the final decisions of State courts of last resort, involving a federal question, when the decision of the State court was against the right claimed under federal authority. This jurisdiction it has exercised without any substantial change from 1789 until the present time, and such jurisdiction is declared by the appellate courts act of 1891 to be unaffected by that statute.

The court of claims, established in 1855, has jurisdiction to decide claims against the United States in a variety of cases under the provisions of several general statutes and of a number of special acts. Speaking in general terms, it has jurisdiction to decide claims against the government arising *ex contractu*, by express or implied contract, but not to decide claims

[1] *Ante*, p. 106, § 2.

[2] Joint resolution, *ante*, p. 16.

for injuries by torts.[1] By a recent statute it is given jurisdiction to virtually render judgment in certain cases against Indian tribes.[2]

The Supreme Court of the United States, circuit courts, district courts, the new circuit courts of appeals created by the act of 1891, and the court of claims, comprise the United States courts which have been created under the third article of the federal constitution. Perhaps the court of private land claims should be added to the foregoing list, but that is doubtful. The judges of the courts created under the third article of the federal constitution hold office, by the terms of the constitution, during good behavior, and can be removed only by impeachment, by the abolition of the courts over which they respectively preside, by resignation or by death.

In the Territories over which the power of Congress is general, and unrestrained by the limitations imposed by article 3 of the constitution upon the federal judicial power to be exercised within the States, there are such courts of original and appellate jurisdiction as Congress has established; and appeals are usually provided for from important decisions of the supreme court of a Territory to the Supreme Court of the United States. The judges of the Territorial courts hold office, not by constitutional tenure during good behavior, but for such terms as Congress prescribes.

The remarks upon Territorial courts apply to the courts of the District of Columbia. The supreme court of the District of Columbia, however, in addition to its functions as a court of the District, has some jurisdiction, which relates to the nation, and which is exclusive of the jurisdiction of circuit and district courts. It is the only court which has general power to issue a *mandamus* to a federal executive officer, for example, a secretary of the treasury, to compel him at the instance of any private person interested, to perform a plain ministerial official duty, not involving the exercise of discretion.[3] Circuit and district courts have no power to issue a *mandamus* to federal officers or others, except (1) in a few classes of cases where such power is specially conferred by statute, and (2) as ancillary to

[1] Consult R. S., §§ 1049–1093, 5261; 24 Stat., 505, § 1, March 3, 1887, *ante*, p. 505; 26 Stat., 851, March 3, 1891; 18 Stat., 192, June 22, 1874, R. S. Sup., 83; 18 Stat., 252, June 23, 1874, R. S. Sup., 105; 18 Stat., 452, March 3, 1875, R. S. Sup., 170; 20 Stat., 278, Feb. 3, 1879, R. S. Sup., 404; 20 Stat., 171, June 19, 1878, R. S. Sup., 371; 20 Stat., 324, March 1, 1879, R. S. Sup., 421; 21 Stat., 284, June 16, 1880, R. S. Sup., 562, limited, 22 Stat., 469; 21 Stat., 504, March 3, 1881, R. S. Sup., 608; 22 Stat., 98, June 5, 1882; 22 Stat., 168, July 15, 1882; 22 Stat., 485, March 3, 1883; 22 Stat., 582, 585, March 3, 1883; 22 Stat., 635, Jan. 24, 1883; 23 Stat., 283, Jan. 20, 1885; 23 Stat., 350, March 3, 1885; 25 Stat., 694, Feb. 25, 1889; 25 Stat., 1013, March 2, 1889.

[2] 26 Stat., 851, March 3, 1891.

[3] Some cases in which this jurisdiction has been invoked are: Redfield

a suit of which they have already acquired jurisdiction.[1] The supreme court of the District of Columbia has exclusive jurisdiction of an appeal from the decision of the commissioner of patents rejecting an application for a patent for an invention.[2]

A court of private land claims, to consist of five judges, is established by an act of March 3, 1891, with jurisdiction to decide claims of private parties and cities and towns, to land in the States and Territories, under Spanish and Mexican grants, so as to bar the title of the United States thereto.[3] It is provided that no right of a private party against a private party shall be affected by a judgment of the court.[4] It is provided also that the powers of the court and the term of office of its judges shall cease on December 31, 1895.[5] It is doubtful if this is a federal court established under the third article of the constitution, for by the terms of the statute which establishes the court, its judges are to hold office for a fixed term, not during good behavior. The validity of the organization of the court may be upheld perhaps on the ground that as the United States cannot be sued without their assent they may impose conditions upon the right to sue them, one of which may be that a claimant shall prosecute his claim in a court of different organization from that prescribed by the constitution for the decision of suits between private parties.

Foreign ministers and consuls of the United States exercise, under treaties and statutes, in several semi-civilized countries, judicial powers and hold *quasi*-federal courts. The power of Congress to establish these courts of foreign ministers and consular courts rests chiefly, without doubt, on the treaty-making power of the United States.[6]

An act of October 1, 1888, provides for boards of arbitration to adjust controversies between common carriers engaged in interstate or Territorial commerce and their employees.[7]

Courts-martial, military and naval, are maintained under the power of the general government, conferred by the constitution, "to raise and support armies" and "to provide and maintain a navy."

v. Windom, 137 U. S., 636; United States *v.* Lynch, 137 U. S., 280; Miller *v.* Raum, 135 U. S., 200; United States *v.* Black, 128 U. S., 40; United States *v.* Bayard, 127 U. S., 251; Bayard *v.* United States, 127 U. S., 246; Carrick *v.* Lamar, 116 U. S., 423; Butterworth *v.* Hoe, 112 U. S., 50; Wyman *v.* Halstead, 109 U. S., 654; United States *v.* Schurz, 102 U. S., 378; United States *v.* Boutwell, 17 Wall., 604; The Secretary *v.* McGarrahan, 9 Wall., 298; United States *v.* Commissioner, 5 Wall., 563; Commissioner of Patents *v.* Whiteley, 4 Wall., 522.

[1] See *post*, § 5, on the original jurisdiction of circuit courts.

[2] R. S., §§ 4911–4914.

[3] 26 Stat., 854, March 3, 1891.

[4] Sec. 13 of act, 26 Stat., 854.

[5] Secs. 1, 19, of act, 26 Stat., 854.

[6] See R. S., §§ 4083–4130.

[7] 25 Stat., 501.

§ 2. **The judicial power of the United States.** A full discussion of this topic would be inconsistent with the purpose of this book. A sketch of it will be attempted, however, containing a comparison between the federal judicial power and the total judicial power of the nation, as that is an aspect of the subject not generally discussed in text-books.

The judicial power of any civilized nation of modern times may be divided conveniently as follows: (1) The enforcement of the rights of the nation against individuals, including under this head both criminal prosecutions and civil suits brought by its authority. (2) The enforcement of the rights of individuals against the nation, *e. g.* by suits against it brought with its consent. (3) Private law, the enforcement of the rights of an individual against an individual, including the enforcement (a) of his rights of dominion (*i. e. in rem*) over his own body, life and reputation, (b) of his rights *in rem* over other persons (slight since the abolition of slavery), (c) of his property rights, *i. e.* his rights *in rem* over land, inanimate movables and animals, including patent-rights, copyrights and their like, which may be described as rights of dominion over indeterminate objects, and (d) of his primary rights *in personam*, contractual and otherwise. In this division, the enumeration of primary rights — *i. e.* rights given for their own sake — includes under each primary right the secondary rights arising from it, whether they are in substitution for a violated primary right or are rights to remedies. In our own country the national judicial power to be exercised within the States is divided between the government of the United States and the several States. The former has only such judicial, legislative and executive powers as the people have delegated to it by the federal constitution. With the exception of the limited original jurisdiction bestowed on the United States Supreme Court, the people by the constitution have conferred no jurisdiction directly on federal courts. Congress is authorized to confer jurisdiction upon them in its discretion within certain limits. This possible jurisdiction, which Congress may bestow, is the judicial power of the United States, or more briefly, the federal judicial power.[1] Of jurisdiction under the first head into which the total judicial power of a nation is divided by the foregoing analysis the federal judicial power embraces — all criminal prosecutions[2] and civil suits[3] by the United States,

[1] Defined in Const., art. 3, sec. 2, as modified by amendment XI.

[2] Jurisdiction of criminal prosecutions by the United States is given by Const., art. 3, sec. 2, clauses 1, 3, authorizing jurisdiction of cases at law and in admiralty, not by clause 4, authorizing jurisdiction of controversies in which the United States is a party, which embraces only civil suits. *Accord.* Tennessee *v.* Davis, 100 U. S., 257. The term "controversies" embraces only civil suits. Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265, 298.

[3] Const., art. 3, sec. 2, clause 4. Ju-

including prize cases and other suits in admiralty, by the government to enforce the forfeiture of a vessel,—criminal prosecutions by a State when they present a federal question, *i. e.* one arising under the constitution, laws or treaties of the United States, usually brought before a federal court by writ of error or removal from a State court, or when they present some other question which would give the court jurisdiction irrespective of the character of the parties, *i. e.* one affecting a foreign minister[1]—also civil suits by a State against a sister State,[2] a citizen of a sister State,[3] an alien, or a foreign nation consenting to be sued, or against any one when the subject-matter would give the court jurisdiction irrespective of the character of the parties.[4] Where the subject-matter would not confer jurisdiction irrespective of the character of the parties, the federal judicial power does not include a criminal prosecution by a State,[5] nor a civil suit by a State against one of its own citizens or against a citizen of the United States residing in the District of Columbia or in a Territory.[6]

Of jurisdiction under the second head of judicial power, namely, suits against the nation, the judicial power of the

risdiction of civil suits by the United States may also be maintained under clauses 1 and 3 in some classes of cases.

[1] Const., art. 3, sec. 2, clause 1, embraces criminal as well as civil suits removed from a State court. Tennessee *v.* Davis, 100 U. S., 257, 264, 271.

[2] Const., art. 3, sec. 2, clause 5. The suit must be civil in its nature. See Pennsylvania *v.* Wheeling Bridge Co., and Wisconsin *v.* Pelican Ins. Co., in the next note. And not a suit to enforce a political right as distinguished from a legal right. Kentucky *v.* Dennison, 24 How., 66. Must not be a suit by a State suing on behalf of some of its citizens in which it has no interest of its own. New Hampshire *v.* Louisiana, 108 U. S., 76.

[3] Const., art. 3, sec. 2, clause 5. The federal judicial power does not embrace a suit by a State founded on a judgment recovered by it in one of its own courts against a citizen or corporation of a sister State for a pecuniary penalty for the violation of its municipal law. Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265. A State cannot bring an original suit as a sovereign in a federal court, but suits by a State are not confined to actions *ex contractu;* a State may sue in equity to abate a nuisance as an owner. Pennsylvania *v.* Wheeling Bridge Co., 13 How., 518.

[4] *Accord.* Ames *v.* Kansas, 111 U. S., 449.

[5] Criminal prosecutions by a State stand on a different footing from civil suits by a State because the word "controversies," which is used in the constitutional grant of jurisdiction dependent on the character of the parties, means civil suits only. Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265, 297 *et seq.*

[6] *Accord.* Hepburn *v.* Ellzey, 2 Cranch, 445, holding that a resident of the District of Columbia cannot sue in the federal courts as a citizen of a State. Barney *v.* Baltimore City, 6 Wall., 280. Consult Const., art. 3, sec. 2.

United States includes suits by any one against the United States brought with their consent, which must be manifested in general by an act of Congress,[1] or brought without the consent of the United States by way of appeal or writ of error.[2] The federal judicial power which is referable to the head of general jurisdiction under consideration also includes civil suits against a State brought with its consent by a citizen of a sister State[3] or by an alien,[4] or without its consent by the United States,[5] a sister State,[6] a foreign nation,[7] or by any one by way of appeal or writ of error.[8] It does not include a suit against a State by one of its own citizens unless the subject-matter permits jurisdiction and the State consents to be sued,[9] nor probably a suit against a State by a citizen of the United States, not a citizen of any State, *i. e.* residing in the Territories or the District of Columbia, unless the subject permits jurisdiction and the State consents.[10]

Coming to the consideration of suits between individuals, *i. e.* between parties who are private parties within the United States, we find that such cases, falling within the federal judicial power, may be divided into three classes,—first, those in which the jurisdiction is founded on the subject-matter, *i. e.* cases arising under the constitution, laws and treaties of the United States, cases affecting foreign ministers and consuls,

[1] The Davis, 10 Wall., 15, 19; United States *v.* Lee, 106 U. S., 196, 205. Waiver of exemption from suit may be made by the President upon an assessment of damages against the United States, supplementary to a prize suit in admiralty instituted by the United States. The Neustra Senora de Regla, 108 U. S., 92.

[2] Hans *v.* Louisiana, 134 U. S., 1, 19, 20.

[3] The federal judicial power does not include a suit by a citizen of a State against a sister State, not consenting to be sued, although a federal question be involved. Hans *v.* Louisiana, 134 U. S., 1, 10.

[4] This case is within the terms of the constitutional grant of judicial power, supposing a State to waive its exemption from suit. A State may always do that. Clark *v.* Bernard, 108 U. S., 436, 447.

[5] Const., art. 3, sec. 2, clause 4.

[6] Const., art. 3, sec. 2, clause 5.

[7] Const., art. 3, sec. 2, clause 9.

[8] Cohens *v.* Virginia, 6 Wheat., 264, 410. *Accord.* Ames *v.* Kansas, 111 U. S., 449, holding that a *quo warranto* suit by a State against a corporation (domestic for the purposes of the suit), involving a federal question, may be removed from a State to a federal court on the application of the defendant.

[9] A citizen cannot bring an original suit against his own State, without its consent, although a federal question be involved. Hans *v.* Louisiana, 134 U. S., 1. Amendment XI does not exclude from the jurisdiction of the federal courts a suit by a State against one of its own citizens which involves a federal question and in which such citizen has become appellant. Ames *v.* Kansas, 111 U. S., 449.

[10] *Accord.* Hepburn *v.* Ellzey, 2 Cranch, 445; Barney *v.* Baltimore City, 6 Wall., 280.

admiralty cases on the instance side of the court, and cases of ancillary jurisdiction;[1] — second, those in which the jurisdiction depends on the character of the parties, *i. e.* cases between citizens of different States, or between a citizen and an alien, or between a citizen and a foreign nation, or between citizens of the same State claiming lands under grants of different States; — and third, cases arising in the Territories, the District of Columbia, forts, navy-yards and other ceded places, where the judicial power of the United States is general.[2] A case which involves a federal question is within the federal judicial power although it also involves other questions of fact and law.[3] The federal judicial power founded on the character of the parties does not extend to a suit between aliens,[4] or to a suit between a foreign nation and an alien,[5] or to a suit between a citizen of the United States residing in the District of Columbia or in one of the Territories and a citizen of the United States residing in a State or an alien;[6] neither does it extend to the enforcement of criminal law, as the word "controversies" in the constitutional grant of judicial power refers only to civil suits.[7]

In what has been said heretofore it has been assumed that the parties to a suit were a single plaintiff and a single defendant. The general question, whether the federal judicial power based on the character of the parties alone embraces a suit, when at the time the court takes jurisdiction there is a plurality of plaintiffs or defendants, and one of the requisite relations as to character does not exist between each plaintiff and each defendant, has not been authoritatively decided by the Supreme Court. In a number of decisions, however, of that court construing the separable controversy clause of section 2 of the

[1] Const., art. 3, sec. 2, clauses 1, 2, 3. After jurisdiction of a suit has once attached — *e. g.*, because the cause is between citizens of different States — a federal court may exercise ancillary jurisdiction without regard to the citizenship of the parties. Stewart *v.* Dunham, 115 U. S., 61, 64.

[2] Jurisdiction dependent on character of the parties. Const., art. 3, sec. 2, clauses 4 to 9. Jurisdiction dependent on place. Const., art. 4, sec. 2, cl. 2, and art. 1, sec. 8, cl. 17. American Ins. Co. *v.* Canter, 1 Peters, 511.

[3] Osborn *v.* U. S. Bank, 9 Wheat., 738, 823; The Mayor *v.* Cooper, 6 Wall., 247, 252.

[4] Hodgson *v.* Bowerbank, 5 Cranch, 303; Mossman *v.* Higginson, 4 Dall., 12. Lack of jurisdiction of a suit between aliens to be recognized must be proved in the regular way. Hartog *v.* Memory, 116 U. S., 588.

[5] Const., art. 3, sec. 2.

[6] Citizen residing in District of Columbia a party. Hepburn *v.* Ellzey, 2 Cranch, 445; Barney *v.* Baltimore City, 6 Wall., 280. Citizen residing in Territory a party. New Orleans *v.* Winter, 1 Wheat., 91.

[7] Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265. In determining whether a suit is of a civil nature a court will look back to the original cause of action. *Id.*

judiciary act of 1875, as originally enacted, it is assumed, without expressly deciding the question, that the judicial power of the United States extends to the whole of a suit which contains a separable controversy between plaintiffs and defendants who are citizens of different States, although the suit also embraces other controversies and although there are other plaintiffs and defendants who are citizens of the same State.[1] Chief Justice Waite's statement[2] *arguendo* in an earlier decision, to the effect that diversity of citizenship between each plaintiff and defendant must exist to bring the case within the federal judicial power, is limited by these later decisions. The ancillary jurisdiction exercised by federal courts and the jurisdiction exercised by them in pursuance of R. S., § 737, allowing a suit at law or in equity to be brought without joining a non-resident who, although interested in the subject-matter of the suit, is not an indispensable party, furnish additional arguments in support of the later decisions.

Cases in which the jurisdiction depends on the character of the parties may arise from any part of the broad field of substantive private law. The United States Supreme Court, speaking by Justice Field, has said:— "The constitution imposes no limitation upon the class of cases involving controversies between citizens of different States to which the judicial power of the United States may be extended; and Congress may therefore lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary."[3] And that court has held in a chain of decisions that a proceeding in a State court savoring of ecclesiastical jurisdiction — *e. g.* a suit to annul the probate of a will, a suit to establish a claim against a decedent's estate — becomes, when an issue has been formed between definite parties, a case at law within the meaning of the constitutional grant of federal judicial power.[4] The federal courts recognize and enforce new primary rights created by the States,[5] and even in some cases new remedies created by them;[6]

[1] Barney *v.* Latham, 103 U. S., 205; Hyde *v.* Ruble, 104 U. S., 407, 409; Brooks *v.* Clark, 119 U. S., 503, 512.

[2] Ober *v.* Gallagher, 93 U. S., 199, 204. Question of the extent of the federal judicial power based on the character of the parties argued but not decided in case of Sewing Machine Cos., 18 Wall., 553.

[3] Gaines *v.* Fuentes, 92 U. S., 10, 18. An eminent domain suit by a corporation of a State against a landowner in the State, a citizen of a sister State, may be removed by the latter into a federal court. Boom Co. *v.* Patterson, 93 U. S., 403.

[4] Gaines *v.* Fuentes, 92 U. S., 10; Ellis *v.* Davis, 109 U. S., 485; Hess *v.* Reynolds, 113 U. S., 73.

[5] A federal court will enforce an administrator's right, given by State statute, to receive damages for causing the death of his intestate, although such statute provides that the right shall be enforced only in a State court. Railway Co. *v.* Whitton, 13 Wall., 270.

[6] Gromley *v.* Clark, 134 U. S., 338;

and this is so although by State law jurisdiction to enforce such rights and administer such remedies is confined to particular State courts.[1]

Still it must not be supposed that the judicial power of the United States extends, even when the constitutional conditions as to diverse citizenship are fulfilled, to every part of judicial power. The grant of judicial power in the federal constitution is limited by its terms to suits between parties and does not include *ex parte* judicial proceedings, such as the ordinary grant of probate of a will by a State court,[2] the *ex parte* appointment of a guardian, conservator or administrator, or the *ex parte* issue of letters testamentary to an executor.[3] It is possible, too, that there are one or more exceptions to the rule announced by Justice Field and previously cited, and that even when the citizenship of the parties is diverse the federal judicial power does not include all jurisdiction *inter partes;* for example, that it may not include granting a divorce, allowing alimony, the original grant of the probate of a will, or the appointment and removal of administrators, executors and guardians, although such proceedings be contested. While there seem to be no sound reasons for making these exceptions, the opinion that they exist is supported by the consideration that the federal courts have never exercised jurisdiction within the States in these cases, and that the Supreme Court has disclaimed any power in the courts of the United States to grant a divorce or allow alimony, speaking, however, of cases brought under a statute which imposed as a condition of jurisdiction a definite amount in controversy.[4] This possible defect of power in the federal courts is in all cases a lack of power to administer certain remedies, not a lack of power to recognize primary rights and to enforce them so far as the remedies at the command of the courts will allow. The exclusion of federal courts from the exercise of these powers is probably due, in part to views of expediency in those who have moulded their jurisdiction, and in part to the survival of distinctions existing in English law at and before the time of

Broderick's Will, 21 Wall., 503, 520; Holland *v.* Challen, 110 U. S., 15, 24.

[1] *Accord.* Railway Co. *v.* Whitton, 13 Wall., 270.

[2] Ellis *v.* Davis, 109 U. S., 485. 497.

[3] The reasoning in Ellis *v.* Davis, *supra*, applies to these cases as much as to the case before the court.

[4] Barber *v.* Barber, 21 How., 582, 584. This decision cannot well be founded on the unity of citizenship of husband and wife, as has been suggested on circuit, in view of the language of the Supreme Court in Cheever *v.* Wilson, 9 Wall., 108, 124. *Accord.* Anderson *v.* Watt, 138 U. S., 694, 706. As showing the disinclination of the Supreme Court to have federal courts exercise jurisdiction affecting the *status* of persons, see *In re* Burrus, 136 U. S., 586, holding that a federal district court cannot restore a child to its father by *habeas corpus*, although the citizenship of the parties be diverse.

our separation from the mother country. During the period of English colonization of America and at the time when the federal constitution was adopted, there were in England four systems of civil courts, namely — the common-law courts — the ecclesiastical courts, exercising exclusive jurisdiction, *inter alia*, to appoint administrators and executors, to admit a will to probate, and to grant a divorce — admiralty courts — and chancery courts, exercising a general chancery jurisdiction supplementing and controlling the other jurisdictions, and a prerogative jurisdiction, including the supervision of minors and lunatics and the appointment of guardians for them. The jurisdiction which federal courts *have not exercised* in the administration of private law is the exclusive jurisdiction of the English ecclesiastical courts and the prerogative jurisdiction of the English chancery.

The federal judicial power does not extend to the decision of political questions, that is, of questions within the exclusive jurisdiction of the legislative and executive departments of government,— whether arising in a suit between private persons or in a suit in which the United States or a State is a party,[1] — nor to the direction of federal and State legislative and executive officers in the performance of their duties involving the exercise of discretion. But a State officer may be enjoined by a federal court of equity from acting under a void State law to the destruction of a franchise granted by the United States.[2] Federal executive officers, inferior to the President,[3] and State officers may be compelled by the judicial department to perform a purely ministerial duty not involving the exercise of discretion.[4]

In addition to the four systems of civil courts before mentioned, namely, the common law, canon law, admiralty and equity courts, there was in England at the time of the formation of our government a fifth system of courts, namely, courts-martial, including in that term naval as well as army courts. We have such courts, both under the federal and State

[1] Georgia *v.* Stanton, 6 Wall., 50; Mississippi *v.* Johnson, 4 Wall., 475; Kentucky *v.* Dennison, 24 How., 66. A political right is one which executive officers of government will enforce although courts will not do so, *e. g.*, a person's valid claim against a foreign nation not consenting to be sued.

[2] As to federal officers. Georgia *v.* Stanton, 6 Wall., 50; Mississippi *v.* Johnson, 4 Wall., 475. As to State officers. Hagood *v.* Southern, 117 U. S., 52, 69, 70. As to injunction against State officer. Osborn *v.* United States Bank, 9 Wheat., 738.

[3] Example of denial of injunction against the President. Mississippi *v.* Johnson, 4 Wall., 475.

[4] As to federal officers, see cases cited, *post*, as to power of the Supreme Court of the District of Columbia to issue a *mandamus* to federal executive officers. As to State officers. Hagood *v.* Southern, 117 U. S., 52, 69, 70.

governments, administering a body of substantive law of their own. The judicial power of the United States defined in the second section of the third article of the federal constitution does not include this military jurisdiction,[1] although federal courts may examine its exercise by the military courts and relieve, *e. g.* by writ of *habeas corpus* or prohibition, against unauthorized acts done by them without jurisdiction under color of its authority.[2]

This sketch of the judicial power of the United States would be incomplete did it not contain mention of the jurisdiction, both criminal and civil, exercised in semi-civilized independent countries by United States ministers and consuls. This jurisdiction is exercised under the provisions of treaties and statutes, and undoubtedly rests chiefly on the treaty-making power of the federal government conferred by the constitution.[3]

§ 3. **Jurisdiction of circuit courts over suits by and against the United States.** Circuit courts have jurisdiction of all prosecutions for crimes against the United States, unless otherwise specially provided, including concurrent jurisdiction with district courts of crimes cognizable by the latter.[4] Under the provisions of the federal constitution[5] an accused person must be tried in the State and district in which the crime was committed, if it was committed in any State. The trial of crimes committed upon the high seas or elsewhere out of any particular State or district is, by statute, to be in the district where the offender is found or into which he is first brought.[6] A person accused of a crime against the United States may be arrested anywhere in the United States for trial in the proper district;[7] and a witness in a criminal case may be required to go from any place in the United States to attend the trial.[8] The provisions in section 1 of the amended judiciary act of 1875, relating to the place of suit, do not govern criminal prosecutions, being expressly limited to civil suits.

The circuit court for the district of California is given appel-

[1] Kurtz *v.* Moffitt, 115 U. S., 487, 500; Smith *v.* Whitney, 116 U. S., 167.

[2] Example of the exercise of such jurisdiction. *Ex parte* Mason, 105 U. S., 696; Wales *v.* Whitney, 114 U. S., 564; Dynes *v.* Hoover, 20 How., 65; Smith *v.* Whitney, 116 U. S., 167.

[3] Consult R. S., §§ 4088 *et seq.*

[4] Amended judiciary act of 1875, section 1, clause 6, *ante*, ch. 2. See provisions for criminal prosecutions by the United States mentioned *post* with civil suits. Act of September 4, 1890, extends criminal jurisdiction of circuit and district courts to the Great Lakes. 26 Stat., 424.

[5] Const., art. 3, sec. 2; Amendment VI.

[6] R. S., § 730. Murder committed on island of Navassa, in West Indies, within the jurisdiction of the United States as declared by the executive department of government, may be punished under R. S., § 5575. Jones *v.* United States, 137 U. S., 202.

[7] R. S., § 1014.

[8] R. S., § 1014.

late jurisdiction to review, in certain cases, the decisions of United States consular and foreign minister's courts held in China and Japan, both in criminal and civil cases.[1]

Federal circuit courts have original jurisdiction probably of all civil suits in which the United States are plaintiffs, irrespective of the amount in controversy. The judiciary act of 1875, as amended in 1887, certainly confers such jurisdiction generally when the value in controversy exceeds $2,000, and appears to confer it without any limit as to the value involved.[2] The decisions on circuit are conflicting as to the proper construction to be placed upon the statute[3] and the Supreme Court has not yet passed upon the question. The act of 1875, as originally enacted, did not confer on the circuit courts jurisdiction of civil suits by the United States, when the value in controversy was $500 or less.[4] But the language of the amendment of 1887 as to the value in controversy is quite different from that employed in the original act of 1875. In section 1 of the original act of 1875 the limitation as to the value in controversy occurs only once, at the beginning of the section, and applies to all the clauses which follow it, while in the amended section the limitation as to the value in controversy is repeated as a part of several clauses conferring jurisdiction over distinct classes of cases, raising the presumption that a clause — like the one conferring jurisdiction of suits brought by the United States — which does not contain a limitation as to the value in controversy, is intended by Congress to be free from such limitation. It has not yet been decided whether the requirement in section 1 of the amended judiciary act of 1875, that a suit shall be brought only in the district of defendant's residence, with an exception which need not be noticed here, applies to civil suits brought under that act by the United States, nor how far such requirement governs the place of bringing suits by the United States provided for by other statutes. There seems no sound ground for disregarding the limitation in question as to place of suit, except in cases as to which Congress has clearly manifested an intention that it should not apply. The jurisdiction conferred on circuit courts by the amended judiciary act of 1875 over civil suits in which the United States are plaintiffs is confined doubtless to suits at law and in equity, and does not include probably civil admiralty suits by the United States — *e. g.* to condemn a vessel as a prize or to enforce its forfeiture for the violation of some statute — for during the whole period of the nation's life cir-

[1] R. S., §§ 4093–4096.

[2] Amended judiciary act of 1875, sec. 1, *ante*, ch. 2.

[3] In favor of the jurisdiction without reference to value in controversy. United States *v.* Shaw, 39 F. R., 433. *Contra*, United States *v.* Huffmaster, 35 F. R., 83; S. C., 13 Sawyer, 283.

[4] 18 Stat., 470.

cuit courts have never exercised admiralty jurisdiction to any material extent, except by way of appeal.

Whether or not circuit courts have jurisdiction under the amended judiciary act of 1875 of civil suits generally by the United States in which the value in controversy is less than $2,000, they have been held on circuit to have such jurisdiction in particular classes of cases under prior statutes declared to be still in force, *e. g.* under Revised Statutes, sec. 629, clauses 3, 4, they have been held to have jurisdiction of all suits at common law, without regard to the value in controversy, where the United States, or any officer thereof suing under an act of Congress, are plaintiffs,[1] and of suits, without limitation as to the value in controversy, arising under customs, internal revenue, and postal statutes.[2] This jurisdiction is sustained in one decision on the theory that the amended judiciary act of 1875 repeals only the first clause of section 629 of the Revised Statutes, which is general, and leaves in force the second and following clauses of that section, which refer to particular classes of cases.[3] It was said in another decision that the amended judiciary act of 1875 refers only to cases of which the federal and State courts have concurrent jurisdiction, not to cases of which the federal courts have exclusive jurisdiction, but this theory is evidently untrue unless limited,[4] and does not account for the fact, that Revised Statutes, sec. 629, clause 3, just mentioned, giving circuit courts jurisdiction of suits at common law by the United States, remains in force, for State courts evidently have concurrent jurisdiction with federal courts of such suits. It is unnecessary, however, to account for the fact, that prior statutes, which purport to confer jurisdiction on federal circuit courts, which are of narrower scope than the amended judiciary act of 1875, and which are consistent with it and are not expressly repealed, remain in force. Federal circuit courts have jurisdiction, without doubt, of civil suits by the United States in a number of special classes of cases under statutes enacted both before and after March 3, 1887, when the amended judiciary act of 1875 took effect.[5]

[1] Armstrong *v.* Ettlesohn, 36 F. R., 209.

[2] Ames *v.* Hager, 36 F. R., 129; S. C., 13 Sawyer, 473; United States *v.* Shaw, 39 F. R., 433.

[3] United States *v.* Shaw, 39 F. R., 433.

[4] Section 1 specifically confers on circuit courts jurisdiction of crimes against the United States, a class of cases in which the jurisdiction of federal courts is exclusive of State courts.

[5] By the Revised Statutes and subsequent acts of Congress circuit courts are given jurisdiction, *inter alia*, in addition to the classes of suits by the United States, previously mentioned, of all suits by the United States for the enforcement of forfeitures and penalties provided for by merchant-seamen laws (R. S.,

The federal statutes do not provide for the removal by the United States of a suit begun by them in a State court into a federal court.

Criminal suits by the United States and civil suits, including probably civil suits to which the United States are a party,

§ 629, cl. 5; R. S., § 4610; 22 Stat., 186, August 2, 1882); of all suits for the condemnation of property taken as prize because employed in aid of insurrection (R. S., § 629, cl. 6; R. S., §§ 5308, 5309, 5311); of all suits arising under any law relating to the slave trade (R. S., § 629, cl. 7); of all suits by writ of *quo warranto* to remove any person from office (R. S., § 629, cl. 14; R. S., § 1786); of suits to recover taxes, fines and forfeitures (R. S., § 3213); of suits to enforce the forfeiture of vessels engaged in the cooley trade (R. S., § 2159); of suits by the comptroller to forfeit the franchises of a national bank (R. S., § 5239); of criminal prosecutions and actions for penalties under the civil rights act (18 Stat., 335, March 1, 1875, R. S. Sup., 148); of prosecutions for theft or embezzlement from the United States (18 Stat., 449, March 3, 1875, R. S. Sup., 183); of prosecutions of persons injuring trees on government land (18 Stat., 481, March 3, 1875, R. S. Sup., 186); of suits to enforce forfeitures and penalties under an act to reduce internal revenue taxation (22 Stat., 488, March 3, 1883); of prosecutions for counterfeiting (23 Stat., 22, May 16, 1884); of prosecutions for the violation of the act to establish a bureau of animal industry (23 Stat., 31, 33, May 29, 1884), of suits to enforce and to enjoin the violation of an act to prevent the unlawful occupation of public lands (23 Stat., 321, February 25, 1885); of suits for penalties under an act to prohibit the importation of alien laborers (23 Stat., 332, February 26, 1885); of criminal suits and civil suits for an injunction, *mandamus* or damages under the Interstate Commerce Act (*ante*, ch. 2, Statute No. 9); of criminal prosecutions and suits for penalties and forfeitures under an act to execute treaty provisions with China (24 Stat., 409, February 23, 1887); of *mandamus* suit under the provisions of an act relating to subsidized railways (25 Stat., 382, August 7, 1888); of *mandamus* suits to compel officers of courts, clerks, marshals, commissioners and attorneys to account (18 Stat., 333, February 22, 1875, R. S. Sup., 145); of proceedings to restore lost or destroyed court records in which the government is interested (20 Stat., 277, January 31, 1879, R. S. Sup., 403); of appellate power to review the decisions of boards of general appraisers as to duty charges (26 Stat., 131, June 10, 1890, § 15); of criminal suits and civil suits for an injunction or other remedy under an act to protect trade against unlawful restraints and monopolies (26 Stat., 209, July 2, 1890); of criminal and civil suits under the alien immigration act of March 3, 1891 (26 Stat., 1084, § 13); of suits to condemn land for the use of the United States (25 Stat., 357, August 1, 1888, *ante*, p. 110); of *mandamus* suits to compel the Union Pacific Railroad Company to operate its road according to law (R. S., § 5262); and of suits under numerous special statutes, of which the largest class are statutes authorizing the erection of bridges over navigable waters, and providing for bringing, in the adjacent circuit courts, suits arising from the obstruction of navigation by such bridges.

may be removed from a district court into the circuit court for the district on account of the disability or interest of the district judge and on other grounds.[1]

Circuit courts have jurisdiction of suits by a private party against the United States for money demands exceeding $2,000 and not exceeding $10,000, in the same classes of cases, in general, in which the court of claims has jurisdiction.[2] The claims against the United States of which the circuit courts have jurisdiction may be described, in general terms, as claims founded on express or implied contracts with the government and do not include claims for injuries from torts.[3] Claims are not specifically enforced; only money damages are awarded.[4]

The circuit courts have jurisdiction also of suits by an importer against a collector of customs to recover back any alleged excess of duties collected by him. As the importer must pay whatever sum the collector demands in order to obtain his property, the government rarely has occasion to sue for duties, and a judicial determination of the validity of duty charges is often attainable only by a suit in form against the collector, but virtually against the United States.

A circuit court has jurisdiction of a suit by a civil, military or naval receiving or disbursing officer to stay by injunction proceedings against him on the part of the United States by distress warrant against him and his sureties for failure to account and to pay over public moneys alleged to be in his hands;[5] and it has jurisdiction of a suit by a national bank to enjoin proceedings under a receivership of the bank instituted by the comptroller of the currency.[6]

§ 4. **Jurisdiction of circuit courts over suits by and against a State.** A State may probably bring a civil suit which involves a federal question, and in which the value in controversy exceeds $2,000, in a United States circuit court, under the amended judiciary act of 1875, as that statute confers on circuit courts jurisdiction of such suits irrespective of the character of the parties.[7] That statute does not confer on circuit courts jurisdiction of a suit by or against a State

[1] R. S., §§ 587, 588, 601, 637, 1037–1039. For statutory provisions regulating the transfer of civil suits from one circuit court to another, see R. S., §§ 615, 616.

[2] See act of March 3, 1887, *ante*, p. 105.

[3] Act of March 3, 1887, *ante;* Gibbons *v.* United States, 8 Wall., 269; Morgan *v.* United States, 14 Wall., 531.

[4] United States *v.* Jones, 131 U. S., 1.

[5] R. S., §§ 3636, 3637.

[6] R. S., § 5237.

[7] Consult the statute, *ante*, p. 20 *et seq.* *Accord.* Ames *v.* Kansas, 111 U. S., 449, holding that under the act of 1875, as originally enacted, an action of *quo warranto* by a State in one of her own courts against a corporation chartered by herself could be removed into a federal court when it was a suit involving a federal question.

based on the character of the parties.[1] If a State waives its constitutional exemption from suit by a private party, no reason is perceived why it should not be a defendant, under the amended judiciary act of 1875, in a circuit court in any suit, which involves both a federal question and a sufficient value in controversy. If a State does not waive its exemption from suit, it may perhaps still be sued in a circuit court in such a case brought by the United States or by a foreign nation, but in the absence of decided cases it would be unprofitable to discuss the question. It has been decided that a citizen of a State cannot sue his own State, not waiving its exemption, in a federal circuit court, although a federal question be involved, and although such a suit is not expressly prohibited by the eleventh amendment to the federal constitution.[2]

A federal circuit court has jurisdiction, by removal from a State court, of several classes of criminal prosecutions by a State, *e. g.* a prosecution by a State against any person who cannot enforce his civil rights in the State court[3] or against a civil or military officer for acts done or omitted under color of any civil rights law,[4] or against any person for acts done under revenue laws,[5] or against any person holding property under a revenue law where such suit affects the validity of the law,[6] or against any person for acts done under registration laws, *i. e.* under the provisions of R. S. Title XXVI, "The Elective Franchise,"[7] or against an officer of Congress for his official acts.[8] In all these cases the right to remove the cause is in the defendant.

A federal circuit court has jurisdiction, by removal from a State court under the amended judiciary act of 1875, on the defendant's application, of a civil suit which is brought by a State in one of her own courts against a private party, which involves a federal question and a requisite value in controversy, and which could have been brought in a federal circuit court as an original suit.[9]

A suit in which a State is a party or in which the revenue laws of a State are enjoined or stayed is entitled in any fed-

[1] *Accord.* Alabama *v.* Wolffe, 18 F. R., 836, holding that under the act of 1875, as originally enacted, a suit by a State instituted in one of her own courts against a citizen of another State was not removable on the ground of the character of the parties.

[2] Hans *v.* Louisiana, 134 U. S., 1.

[3] R. S., § 641, continued in force by the amendatory act of March 3, 1887, § 5, *ante*. The same remark applies to the next four notes.

[4] R. S., § 641.

[5] R. S., § 643.

[6] R. S., § 643.

[7] R. S., § 643.

[8] Act of March 3, 1875, 18 Stat., 371, § 8; R. S. Sup., 165.

[9] Ames *v.* Kansas, 111 U. S., 449. This case was decided under the act of 1875 as originally enacted, but the amendment of 1887 does not affect the force of the decision. Hans *v.* Louisiana, 134 U. S., 1, before cited, does not conflict with Ames *v.* Kansas, although it limits the inferences which might be drawn from the earlier decision considered alone.

eral court, for cause shown, to priority of hearing over civil suits between private parties.[1]

§ 5. **Original jurisdiction of circuit courts over suits between private parties.** The most important statute conferring on circuit courts of the United States jurisdiction of suits between private parties is the act of March 3, 1875, as amended March 3, 1887, and August 13, 1888.[2] It is designated in this book as the amended judiciary act of 1875. As the act of 1888 merely corrected the enrollment of the amendatory act of 1887, the date from which the amended act of 1875 takes effect is March 3, 1887. Under section 1 of this statute, federal circuit courts have original jurisdiction, concurrent with the courts of the several States, as appears from the face of the act and the settled construction put upon it by the courts, of all civil suits at common law or in equity (1) arising under the constitution, laws or treaties of the United States, in which the value in dispute exceeds $2,000 exclusive of interest and costs, (2) between citizens of different States in which the value in dispute exceeds $2,000 exclusive of interest and costs, (3) between citizens of the same State claiming lands under grants of different States, (4) and between citizens of a State and foreign States, citizens or subjects in which the value in dispute exceeds $2,000 exclusive of interest and costs, all four classes of cases being subject to the following provisos:

(a) That no person shall be arrested in one district for trial in another.

(b) That when the jurisdiction is founded only on the fact that the suit is between citizens of different States it must be brought either in the district where all the plaintiffs reside,[3] in the district of defendant's residence or in some district in which the defendant consents to be sued, and that in other cases the suit must be brought either in the district of defendant's residence or in some district in which defendant consents to be sued.

(c) That a circuit court shall not have jurisdiction of a suit by an assignee to recover on a promissory note or other chose in action (except a foreign bill of exchange) unless the suit might have been prosecuted in such court if no assignment had been made, and shall not have jurisdiction of a suit by a subsequent holder to recover on a promissory note or other chose in action, payable to bearer, (except a foreign bill of exchange or an instrument made by a corporation) unless the suit might have been brought in such court if no transfer had been made.

Reference is made to chapter 2 for a full digest of the decisions of federal courts construing this statute since its last substantial amendment in 1887.[4]

[1] R. S., § 949.

[2] *Ante*, ch. 2, statute No. 3.

[3] Smith *v.* Lyon, 133 U. S., 315.

[4] *Ante*, p. 21 *et seq.*

The proviso relating to the place of suit, designated above as proviso (b), must be read in connection with several other statutory provisions and case law rules, namely — (1) R. S. § 737, which provides that non-residents who are interested in a suit, *e. g.* jointly with a defendant on the record, but who are not indispensable parties, need not be made parties — (2) Section 8 of the act of 1875,[1] which provides that a suit to obtain title to real or personal property situated in the district in which suit is brought or to obtain possession of such property or to enforce a lien or incumbrance thereon, or to remove a lien or incumbrance therefrom, may be brought against non-residents as well as residents — (3) The case law rule of substituted service, which allows constructive service to be had on a party to an ancillary suit in some cases by actual service on his attorney, made by leave of court — (4) The rules under which a defendant to a cross-bill may be made to appear and plead in the cross-suit.[2]

The meaning of the proviso as to place of suit, designated *supra* as proviso (b), with reference to suits by and against corporations was a matter of doubt when it was first enacted, but it seems now settled by a preponderance of authority on circuit, (1) that a corporation can *reside*, within the meaning of the proviso, only in the State by which it was created, although it may have an agent, maintain an office and do business in another State,[3] *e. g.* may maintain and operate a railway there,[4] (2) that a foreign corporation may be sued in the district of plaintiff's residence when the jurisdiction of the court depends only on the diverse State citizenship of the parties, subject of course to the condition that the corporation is found within the district, *i. e.* has an agent there doing corporate business on whom service may be made, or that it voluntarily appears,[5] (3) that a foreign corporation may be sued in any district in which it consents to be sued, as a condition upon which it acquires the right to do business in the State, or otherwise.[6] It has been held that when a corporation is sued in a federal circuit court held in the State under whose

[1] *Ante*, p. 81.

[2] Substituted service allowed on solicitor of defendant in cross-bill being plaintiff in suit. Johnson, etc., Co. *v.* Union, etc., Co., 43 F. R., 331.

[3] Denton *v.* International Co., 13 Sawyer, 355; S. C., 36 F. R., 1; Fales *v.* Chicago, etc., R. Co., 32 F. R., 673; Jessup *v.* Ill. Cent. R. Co., 36 F. R., 735; Preston *v.* Fire-extinguisher Mfg. Co., 36 F. R., 721; Hohorst *v.* Hamburg, etc., Co., 38 F. R., 273; Booth *v.* St. Louis, etc., Co., 40 F. R., 1; Bensinger, etc., Co. *v.* National, etc., Co., 41 F. R., 81.

[4] Filli *v.* Delaware, etc., R. Co., 37 F. R., 65. *Contra*, Riddle *v.* New York, etc., R. Co., 39 F. R., 290.

[5] McCormick *v.* Walthers, 134 U. S., 41; Rawley *v.* Southern Pacific R. Co., 33 F. R., 305; Hills *v.* Richmond, etc., R. Co., 37 F. R., 660.

[6] Consolidated Store Service Co. *v.* Lamson, etc., Co., 41 F. R., 833; McBride *v.* Grand, etc., Co., 40 F. R., 162.

laws it was created and has an office in the federal district in which suit is brought, it is immaterial that its principal office is in another federal district within the State.[1]

The proviso as to place of bringing suit in section 1 of the judiciary act of 1875, as amended in 1887, applies in terms to every civil suit brought in a circuit or district court, and has been held on circuit to govern suits brought under other statutes; *e. g.* it has been held to govern the place of bringing suits under R. S. § 629, without regard to the value in controversy, for the infringement of patents and copyrights.[2] It is probable that the proviso does not govern the place of bringing civil suits under all statutes, and that the intention of Congress must be sought separately as to each class of cases. It is settled by a decision of the United States Supreme Court that the proviso in question does not govern admiralty suits.[3]

In addition to the original jurisdiction conferred upon circuit courts by the amended judiciary act of 1875, they have jurisdiction under many other statutes. It would be unprofitable to attempt to enumerate all of these. The grants of jurisdiction in all of them are much less extensive than the grant of jurisdiction in the amended judiciary act of 1875 and in most cases are included in the latter. Some account of the original jurisdiction of circuit courts given by other statutes and not included in the jurisdiction given by the act of 1875 will now be attempted.

Original jurisdiction of suits between private parties founded on the presence of a federal question is given by the amended judiciary act of 1875, only when the value in controversy exceeds $2,000. When the value in controversy is less, jurisdiction must be sought under other statutes. Prior statutes giving circuit courts jurisdiction of suits founded on the infringement of a patent or a copyright without regard to the amount in controversy are held not to be repealed by the amended judiciary act of 1875.[4]

Circuit courts have power in general, under the Revised Statutes, to issue all writs which are appropriate to the exercise of their jurisdiction and which are not governed by specific statutes.[5] Under this power they may issue a writ of *mandamus* in aid of any jurisdiction previously acquired, *e. g.* to enforce the collection of a money judgment against a municipal corporation,[6] but it gives them no power to entertain an

[1] Zambrino *v.* Galveston, etc., R. Co., 38 F. R., 449.

[2] Reinstadler *v.* Reeves, 33 F. R., 308; Halstead *v.* Manning, etc., Co., 34 F. R., 565; Gormully, etc., Co. *v.* Pope Mfg. Co., 34 F. R., 818.

[3] *In re* Louisville Underwriters, 134 U. S., 488.

[4] Miller-Magee Co. *v.* Carpenter, 34 F. R., 433. *Accord.* Taft *v.* Stephens, etc., Co., 37 F. R. 726.

[5] R. S., §§ 716–719.

[6] Harshman *v.* Knox County, 122 U. S., 306; East St. Louis *v.* Amy, 120 U. S., 600; New Orleans Board of Liquidation *v.* Hart, 118 U. S., 136;

application for the writ as an original suit.[1] Neither does the amended judiciary act of 1875, for the general language employed in section 1 of that statute is limited, and controlled by R. S. § 716, conferring ancillary jurisdiction to issue writs.[2] Circuit courts have jurisdiction, however, under special statutes to issue a writ of *mandamus* as an exercise of original jurisdiction in several classes of cases. They may issue the writ to a common carrier to compel it to file with the interstate commerce commission and publish schedules of rates and fares, and probably to compel it to comply with any lawful order of such commission not arising from a controversy requiring a trial by jury under the constitution.[3] A circuit or district court may issue the writ upon the relation of any person alleging discrimination against him by a common carrier in the conduct of interstate traffic to compel such carrier to carry freight for relator on reasonable terms.[4] A circuit court may issue a *mandamus* to a common carrier at the instance of the interstate commerce commissioners to compel it to comply with the provisions of the act of August 2, 1888, requiring subsidized railway companies to maintain telegraph lines.[5] A circuit court may award a writ of *mandamus* against any officer of the court to compel him to settle his accounts, give bonds and perform such other duties as are specified in the act of February 2, 1875, regulating fees and costs.[6] The proper circuit court may award the writ to compel the Union Pacific Railroad Company to operate its road according to law.[7]

It has been held on circuit that a circuit court can issue a writ of *certiorari* only as an ancillary proceeding.[8]

Circuit courts and the judges thereof are specifically given power by sections 751 and 752 of the Revised Statutes to issue writs of *habeas corpus* to release a person from illegal imprisonment. This power is subject to several constitutional, statutory and common-law limitations. By the federal constitution the limitation is imposed that the application for the writ shall fall within the national judicial power as defined in the second section of the third article of that instrument. One

Cape Girardeau County Court *v.* Hill, 118 U. S., 68; Labette County *v.* Moulton, 112 U. S., 217.

[1] Riggs *v.* Johnson County, 6 Wall., 166; Graham *v.* Norton, 15 Wall., 427; Bath County *v.* Amy, 13 Wall., 244; Kentucky *v.* Dennison, 24 How., 66; Rosenbaum *v.* Bauer, 120 U. S., 450.

[2] Rosenbaum *v.* Bauer, 120 U. S., 450.

[3] *Ante*, pp. 91, 99; 24 Stat., 379, Feb. 4, 1887, § 6, amended 25 Stat., 855, March 2, 1889, § 1; 24 Stat., 379. Feb. 4, 1887, § 16, amended 25 Stat., 855, March 2, 1889, § 5.

[4] *Ante*, p. 105. Additional section, 25 Stat., 855, March 2, 1889, § 10.

[5] 25 Stat., 382, 383, § 3.

[6] 18 Stat., 333, Feb. 22, 1875, § 4; R. S. Sup., 145, 146.

[7] R. S., § 5262. See also 17 Stat., 509, March 3, 1873, on the same subject.

[8] *In re* Martin, 5 Blatch., 303.

statutory limitation is that a federal court shall not issue the writ to release a person in the custody of a State unless his confinement be in violation of the constitution, laws or treaties of the United States.[1] The United States Supreme Court has recently decided that the power of a federal court to issue a writ of *habeas corpus* is limited by the *general jurisdiction* of the court to which application for the writ is made.[2] In the case alluded to it was held that a district court had no jurisdiction of an application for a writ of *habeas corpus* by a father, a citizen of one State, against a citizen of another State, to obtain the custody of petitioner's child, that court having no jurisdiction on the ground of the diverse citizenship of the parties and there being no federal question involved.

The general chancery powers of a circuit court to issue the writ of injunction are curtailed by statute in one important respect. Federal courts are prohibited generally from issuing an injunction to stay proceedings in any State court, except in bankruptcy proceedings,[3] of which there are none in the absence of a federal bankrupt law. This limitation upon the power of federal courts to issue an injunction does not apply to an injunction issued by a federal court to defend its own paramount jurisdiction of a suit.[4] Circuit courts are specifically given power by statute to issue an injunction in several classes of cases, *e. g.* to enjoin the infringement of registered trade-marks used in foreign commerce or commerce with Indian tribes;[5] to enjoin the infringement of patents for inventions;[6] to enjoin the infringement of patents for designs;[7] to enjoin the infringement of copyrights.[8] There are also several statutes, such as the interstate commerce act, which provide for granting injunctions in suits by or against the United States or its officers, and which are mentioned in treating of such suits.[9] The provision in the act of 1887 amendatory of the judiciary act of 1875, directing that suits in a State court against a receiver appointed by a federal court shall be subject to the general equity jurisdiction of the latter court,[10] possibly gives a federal circuit court appointing a receiver a right to enjoin, for cause shown to the court, suits in a State court against such receiver. If such is the proper construction of the statute it limits *pro tanto* section 720 of the Revised Statutes, which prohibits such injunctions.

[1] R. S., § 753.

[2] *In re* Burrus, 136 U. S., 586.

[3] R. S., § 720.

[4] French *v.* Hay (1874), 22 Wall., 250; Dietzsch *v.* Huidekoper (1880), 103 U. S., 494; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S., 578, 600.

[5] 21 Stat., 502, March 3, 1881; R. S. Sup., 606, 607, § 4.

[6] R. S., § 4921.

[7] 24 Stat., 387, Feb. 4, 1887.

[8] R. S., § 4970.

[9] *Ante*, § 3.

[10] *Ante*, p. 113, § 3.

Circuit courts have jurisdiction of civil suits removed from other circuit courts and from the district courts of their respective districts on the ground of the disability or interest of the presiding judges.[1]

§ 6. **Jurisdiction by removal of suits between private parties.** Circuit courts have jurisdiction, by removal from State courts, under the second and third sections of the judiciary act of 1875, as amended in 1887 and 1888[2] — (1) Of any civil suit at law or in equity arising under the constitution, laws or treaties of the United States, in which the value in controversy exceeds $2,000, exclusive of interest and costs, the removal of which is sought by all the essential defendants, whether resident or non-resident, by application to the State court before the time to plead therein[3] — (2) Of any other suit at law or in equity of which circuit courts are given jurisdiction by section 1 (*i. e.* of which they are given jurisdiction on the ground of the character of the parties and the value in controversy), the removal of which is sought by all the essential defendants, being non-residents, by application to the State court before the time to plead therein[4] — (3) Of any civil suit, which includes a separable controversy which is wholly between citizens of different States and which can be fully determined as between them, when the removal of such suit is sought as a whole, by one or more defendants, either non-residents or residents, interested in such separable controversy, by application to the State court before the time to plead therein[5] — (4) Of any suit, involving more than $2,000 exclusive of interest and costs, in which citizens of the State of suit are plaintiffs and citizens of other States are defendants, the removal of which is sought by any defendant, by application to the federal court at any time before the trial of the suit in the State court, when it is made to appear to the federal court, by affidavit or otherwise, that from local prejudice the defendant seeking the removal cannot obtain justice in the State court in which the suit is pending or in any other State court to which he might remove the suit[6] — (5) Of any suit concerning the title to land between citizens of the same State, claiming title under grants of different States, in which the value in controversy exceeds $2,000, exclusive of interest and costs, the removal of which is sought by one or more plaintiffs or defendants, by application, in the manner stated in the statute, to the State court before the trial therein. A digest of the decisions of the federal courts construing the act of 1875 after its amendment in 1887, is given in chapter 2, to which the reader is referred.[7]

[1] R. S., §§ 587, 588, 601, 615, 616, 637.
[2] *Ante*, pp. 38 *et seq.*
[3] See digest, pp. 40–47, 60–67.
[4] See digest, pp. 41–55, 60–67.
[5] See digest, pp. 55–68.
[6] See digest, pp. 68–74.
[7] See pp. 38 *et seq.*

The limitations in section 1 of the amended judiciary act of 1875 as to place of suit do not govern the removal of suits from a State court to a federal circuit court.[1] Neither does the limitation in that section as to suits by assignees.[2]

Circuit courts have jurisdiction by removal from State courts under sections 641, 642, 643, of the Revised Statutes, and possibly also under section 644 and subsection 1 of section 639 of the Revised Statutes, and under section 8 of the act of March 3, 1875,[3] in addition to the jurisdiction by removal conferred upon them by the amended judiciary act of 1875.[4] The statutes mentioned are the only ones now in force conferring on circuit courts jurisdiction of suits by removal from State courts.[5]

§ 7. **The jurisdiction of circuit courts of appeals.** As the jurisdiction of circuit courts of appeals has not been defined and illustrated as yet by any judicial decisions, a useful review of that subject is necessarily confined chiefly to the consideration of the statute which creates those courts, and of the statutes which modify it.

The jurisdiction of circuit courts of appeals is wholly appellate. It is confined to the revision of the decisions of the United States circuit and district courts in those classes of cases which admit of appellate review and which are not reviewable directly by the United States Supreme Court, and to the revision, in certain classes of cases, of the decisions of Territorial courts. It does not embrace any appellate revision of the decisions of the court of claims, the supreme court of the District of Columbia, or the court of private land claims.

Under section 6 of the act of March 3, 1891, establishing circuit courts of appeals, which will be designated hereafter by the shorter expression, the appellate courts act, circuit courts of appeals are given appellate jurisdiction to review all final decisions of circuit and district courts, except in the cases mentioned in section 5 of that act, and except in the cases which are withdrawn from their jurisdiction by the limiting words, "unless otherwise provided by law." The opinion has already been expressed in this book[6] that these words probably refer only, (1) to cases in which the decision of a circuit or district court is final, as is the case when a federal circuit court makes an order remanding a cause to a State court; (2) to cases in which the United States Supreme Court exer-

[1] Fales *v.* Chicago, etc., R. Co., 32 F. R., 673.

[2] Claflin *v.* Insurance Co., 110 U. S., 81.

[3] R. S. Sup., 165; 18 Stat., 371, 401.

[4] See p. 115, act of 1887 and 1888, § 5, and notes thereto.

[5] See p. 116, act of 1887 and 1888, § 6, and notes thereto. R. S., §§ 645, 646, merely regulate the practice upon removal. R. S., § 647, appears to be superseded by § 3 of the amended judiciary act of 1875.

[6] Page 5.

cises appellate revision over the decisions of circuit and district courts by the writ of *habeas corpus*, *mandamus* or prohibition, or by any other method than by appeal or writ of error or certificate of division of opinion between the judges holding the court below; and (3) possibly to exceptional cases, such as an appeal under the revenue law of June 10, 1890. Some additional reasons will now be stated in support of this opinion. The prior statutory provisions which purport to confer appellate jurisdiction on the United States Supreme Court to be exercised by appeal, writ of error or certificate of division of opinion are printed as a note under section 5 of the appellate courts act.[1] The first of those provisions, section 651 of the Revised Statutes, provides for a certificate of division of opinion in criminal cases. Section 5 and 6 of the appellate courts act, between them, provide for the review, by an appeal or writ of error, of *all* final judgments of circuit and district courts in criminal cases, and hence render proceedings by a certificate of division of opinion not only unnecessary as a means to obtain an appellate review of such judgments, but inappropriate because circuitous as compared with the means provided by the later statute. The appellate courts act shows the purpose of Congress to be that convictions of infamous crimes shall be revised directly by the Supreme Court, and that convictions of other crimes shall be revised in the first instance by a court of appeals. Yet proceedings to take convictions of non-infamous crimes directly to the Supreme Court for review by certificate of division of opinion would defeat this purpose. Further, the appellate courts act shows the general intention of Congress to place circuit and district courts on the same footing with respect to the appellate review of their decisions, yet the provision in the Revised Statutes as to certificates of division of opinion relates only to circuit courts. Section 14 of the appellate courts act repeals in general terms all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for appellate review in sections 5 and 6, and probably repeals by implication section 651 of the Revised Statutes providing for a certificate of division of opinion in criminal cases. In *In re* Pennsylvania Company, 137 U. S., 451, the Supreme Court held that a writ of *mandamus* does not lie from that court to a circuit court to review an order of the latter remanding a cause to a State court, because Congress, by expressly abolishing an appellate review of such an order by appeal or writ of error, forbade by implication the appellate review of such an order by any proceeding. The same remarks apply to certificates of division of opinion in civil suits,[2] but with additional force because, the statute makes a proceeding by certificate of division of opinion in a

[1] Pages 5–9.

[2] R. S., §§ 652, 693, printed *ante*, pp. 6, 7.

civil case a species either of an appeal or of a writ of error in name as well as in fact. The other statutory provisions listed under section 5 of the appellate courts act expressly provide for appeals or writs of error and seem to be repealed (subject to the exceptions hereinafter mentioned) by section 14 of that statute, which repeals in general terms all acts and parts of acts relating to appeals and writs of error inconsistent with the provisions for appellate review in sections 5 and 6. The statutory provisions which stand unrepealed are (1) those providing for an appeal or writ of error in classes of cases taken out of the operation of the general repealing clause by their peculiar features, and (2) those which provide for a less period than six months within which an appeal or writ of error may be sued out, and which are continued in force by section 11 of the appellate courts act.

CRIMINAL CASES. The decisions of a circuit court of appeals in criminal cases coming before it are in general final.[1] Under the provisions of section 11 of the appellate courts act the practice as to writs of error from a circuit court of appeals to a circuit or district court in criminal cases will be formed upon the statutory provisions and rules of the Supreme Court governing writs of error to the Supreme Court in criminal cases. Consult statute No. 14, *ante*, page 116, and rule 35 of the Supreme Court, *post*. Perhaps all writs of error in criminal cases must be sued out within sixty days from the expiration of the judgment term.

REVENUE CASES. The decisions of a circuit court of appeals in such cases are in general final.[2] Section 15 of the revenue act of June 10, 1890,[3] probably remains in force at least so far as it provides that an appeal from a decision of a federal circuit court as to the proper amount of duty charges shall be taken within thirty days from the rendition of the decision. It may be that the whole section, which provides for an appeal to the Supreme Court by the United States at its option and by the importer in the discretion of the court, is one of those exceptional statutory provisions before alluded to which are not repealed by section 14 of the appellate courts act. References to several statutory provisions which relate to appeals in revenue cases, and which are probably repealed by the appellate courts act, are collected in a note.[4]

PATENT CASES. The decisions of a circuit court of appeals in cases arising under the patent laws are in general final; but in cases arising under copyright and trade-mark statutes the decision of a circuit court of appeals is final only when the

[1] Appellate courts act, § 6, *ante*, p. 11.

[2] Appellate courts act, § 6, *ante*, p. 11.

[3] *Ante*, p. 9, ¶ 17.

[4] See list of statutory provisions, p. 7, ¶ 7, cl. 2; p. 8, ¶¶ 10, 12; p. 9, ¶ 17.

value in controversy does not exceed $1,000.[1] References to statutes which relate to appeals in such cases, and which are probably repealed by the appellate courts act, are collected in a note.[2]

ADMIRALTY CASES. The decisions of a circuit court of appeals in instance cases in admiralty are in general final.[3] As to the practice on appeals in such cases consult the statutes to which reference is made in the accompanying note.[4]

SUITS FOUNDED ON DIVERSE CITIZENSHIP. In suits between citizens of different States and in suits between a citizen of a State and an alien the decisions of a circuit court of appeals are in general final.[5] The language of the statute is, "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States."[6] This language is too broad. The fact that a suit is between an alien and a citizen of the United States does not necessarily bring it within the judicial power of the United States as defined in the third article of the federal constitution. The federal judicial power based on the character of the parties does not embrace, as before shown,[7] a suit between a citizen of the United States residing in a Territory or in the District of Columbia on one side and an alien or a citizen of a State on the other side. No practical inconvenience results from the broad language of the statute, as that must be construed as limited by the constitution.[8]

OTHER SUITS. The decisions of a circuit court of appeals in cases in which the value in controversy is $1,000 or less and in cases in which there is no definite value in controversy, *e. g.* in a *habeas corpus* suit, and in which therefore there can be no value in controversy exceeding $1,000,[9] are probably final to the same extent as the classes of decisions expressly declared final by statute.

Although section 5 of the appellate courts act provides for taking cases directly from a circuit or district court to the Supreme Court when they involve the construction of the federal constitution or a treaty, or involve the constitutionality of a statute or the validity of a treaty, it does not provide for such direct review of cases merely involving the construction

[1] Appellate courts act, § 6, *ante*, p. 11.

[2] See list of statutory provisions, *ante*, p. 7, ¶ 7, cl. 1; p. 8, ¶ 11.

[3] Appellate courts act, § 6, *ante*, p. 11.

[4] R. S., § 692, *ante*, p. 6, ¶ 3; act of Feb. 16, 1875, *ante*, p. 19.

[5] Appellate courts act, § 6, *ante*, p. 11.

[6] *Id.*

[7] *Ante*, p. 126.

[8] *Accord. In re* Rugheimer, 36 F. R., 369, *ante*, p. 111.

[9] *Accord.* Kurtz *v.* Moffitt, 115 U. S., 487.

of an act of Congress, and cases of that class go for appellate review in the first instance from the courts of original jurisdiction to a circuit court of appeals.

In suits under section 16 of the interstate commerce act, of such a nature that a jury trial may be insisted upon under the federal constitution at the option of any of the parties, an appeal must be taken within twenty days from the rendition of judgment.[1] It is possible that the provisions for appeals in the interstate commerce act[2] are of so exceptional a nature that they stand wholly unrepealed by section 14 of the appellate courts act, and upon that supposition appeals under the act go directly from the courts of original jurisdiction to the Supreme Court.

The same remark applies to the provisions relating to appeals in the act of March 3, 1887, providing for bringing suits against the United States.[3]

APPEALS, ETC., FROM TERRITORIAL COURTS. Section 15 of the appellate courts act confers on circuit courts of appeals appellate jurisdiction to review the decisions of the supreme courts of the Territories in those classes of cases in which the judgments of circuit courts of appeals are made final by that act, *i. e.* "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases." The proper construction to be placed upon these words has already been discussed.[4] For the practice as to appeals and writs of error to review decisions of Territorial courts see the statutes to which reference is made in the footnote.[5]

As to appeals and writs of error to review decisions of the United States court in the Indian Territory, which occupies an exceptional position, see section 13 of the appellate courts act and the notes thereto.

The district court for the Territory of Alaska probably has the *status* of an ordinary district court of the United States,[6] and its decisions, therefore, will be subject to review by the appropriate circuit court of appeals to the same extent as the decisions of other district courts.

§ 8. **The jurisdiction of the United States Supreme Court.** The original jurisdiction of the Supreme Court, conferred upon it directly by the constitution, is not subject, as is well known, to enlargement or limitation by Congress, and is of course unaffected by the appellate courts act.

[1] Page 101; Appellate Courts Act, § 11, p. 13.

[2] See pp. 100, 101.

[3] See pp. 108, 109.

[4] See *ante*, p. 145.

[5] See note 3, *post*, p. 149.

[6] See remarks and case cited, *post*, p. 150.

The appellate jurisdiction of the Supreme Court over the decisions of State courts of last resort, involving a federal question, when the decision of the State court is against the right claimed under federal authority, is expressly declared by the appellate courts act to be unaffected by that statute.[1] The principal statutes governing the exercise of this jurisdiction are cited in the accompanying note.[2]

The appellate jurisdiction of the Supreme Court over the decisions of the court of claims is not referred to in the appellate courts act, and is without doubt unaffected by it. The principal general statutes under which this jurisdiction is exercised are cited in the note below.[3]

The appellate jurisdiction of the Supreme Court of the United States over the decisions of the supreme court of the District of Columbia and of the court of private land claims is also unmentioned in the appellate courts act and must be deemed unaffected by that statute. Statutes governing such jurisdiction are cited in the note below.[4]

The appellate jurisdiction of the United States Supreme Court exercised by means of special writs, of which the writs of *mandamus*, prohibition, *habeas corpus*, *certiorari* and *scire facias* are the chief, is probably unaffected to any material extent by the appellate courts act, which contains no reference to such jurisdiction. The statutory provisions giving the Supreme Court power to issue such writs are printed *ante*.[5]

The Supreme Court has jurisdiction, by appeal or writ of error, to review directly the judgments and decrees of circuit and district courts in the classes of cases enumerated in section 5 of the appellate courts act.[6] In view of the former practice, an action at law should be taken up probably by a writ of error, and a suit in equity or admiralty should be taken up by an appeal. The principal statutes governing the practice in such proceedings are cited in the note below.[7]

[1] Section 4 of the act, *ante*, p. 5.

[2] R. S., §§ 709, 710, 1003, 1017. Proceedings on error and appeal. R. S., §§ 997–1013. A writ of error must be sued out within two years after judgment, except where the prosecutor is an infant, insane or imprisoned. R. S., § 1008.

[3] R. S., § 707; 24 Stat., 505, § 9, March 3, 1887, *ante*, p. 108; 26 Stat., 851, 854, § 10, March 3, 1891; 18 Stat., 452, March 3, 1875, R. S. Sup., 170; 22 Stat., 586, March 3, 1883; 25 Stat., 694, February 25, 1889.

[4] 23 Stat., 443, March 3, 1885, *ante*, p. 86. This statute appears to supersede R. S., §§ 699, 705, 706, and 20 Stat., 320, § 4, Feb. 25, 1879, and R. S. Dist. of Columbia, §§ 846–848. As to court of private land claims, 26 Stat. 854, § 9.

[5] Pages 9, 10.

[6] *Ante*, pp. 4, 5.

[7] See statutory provisions relating to appeals and writs of error printed *ante*, pp. 6–9; an act to facilitate the disposition of cases in the Supreme Court, etc., *ante*, p. 19; an act to regulate commerce, *ante*, pp. 100, 101; an act to provide for bringing

An appeal or writ of error can be sued out probably, judging from past practice, only from *final* judgments and decrees, except perhaps when the appeal or writ of error is taken to test the jurisdiction of the court below.[1] By clause 3 of section 5 of the appellate courts act a direct review by the Supreme Court is given of convictions by a circuit or district court of infamous crimes. The Supreme Court hold that an infamous crime, within the meaning of the federal constitution, is one for which the statute authorizes the court to award an infamous punishment, and that imprisonment in a State prison with or without hard labor is an infamous punishment.[2]

The periods within which an appeal or writ of error in the classes of cases enumerated in section 5 of the appellate courts act can be sued out is not fixed by that statute and is doubtless the same as before its passage; that is to say, the period is in general two years, and if the prosecutor is an infant, insane or imprisoned the two years do not begin to run against him until his disability is removed.[3] Writs of error in capital criminal cases are not granted, however, unless a petition therefor is filed with the clerk of court in which the trial was had within the trial term or by leave of the trial court within sixty days thereafter.[4] And appeals in prize cases must be taken within thirty days of the rendition of the decree unless the trial court extends the period or unless the Supreme Court interfere.[5]

The Supreme Court has jurisdiction possibly, by appeal or writ of error, to review directly the decisions of circuit and district courts in some exceptional classes of cases not falling within the classes of cases enumerated in section 5 of the appellate courts act, *e. g.* their decisions under the act providing for suits against the United States,[6] under section 16 of the interstate commerce act,[7] and under the revenue act of June 10, 1890.[8] If these statutes remain in force unaffected by the words of general repeal in section 14 of the appellate courts act, it is due to the fact that their character is so exceptional that Congress cannot be deemed to have intended to include them under a mere general repealing clause.

suits against the United States, *ante*, pp. 108, 109; an act * * * to provide for writs of error in capital cases, *ante*, p. 116; an act to provide for writs of error and appeals to the United States Supreme Court in all cases involving the jurisdiction of the court below, *ante*, p. 118; R. S., §§ 997–1013, relating to practice on error and appeal; rules of the Supreme Court, *post*, ch. 4. The later provisions largely supersede the earlier.

[1] For some remarks upon the latter class of cases, see *ante*, p. 10.

[2] *In re* Mills, 135 U. S., 263, 267.

[3] R. S., § 1008.

[4] *Ante*, p. 117.

[5] See R. S., §§ 695, 1006, 1009, 4636.

[6] *Ante*, pp. 108, 109.

[7] *Ante*, pp. 100, 101.

[8] *Ante*, p. 9, ¶ 17.

The Supreme Court may exercise appellate jurisdiction over a circuit court of appeals, under section 6 of the appellate courts act, in four ways. 1. It may decide questions of law for the guidance of the lower court upon the certificate of the latter stating the questions concerning which it desires instruction. 2. In any case in which it receives such certificate of inquiry it may require the whole record to be sent up to it, and when it does so it shall decide the case as if brought before it by appeal or writ of error. 3. In any case in which the decision of a circuit court of appeals is made final generally, the Supreme Court may require, by *certiorari* or otherwise, that the record of the case be sent up to it, and shall decide the case with the same power as if brought before it by appeal or writ of error. 4. It may review, by appeal or writ of error, any judgment of a circuit court of appeals, which is not made final generally, and in which the value in controversy exceeds $1,000 exclusive of costs. Cases in which there is no definite value in controversy, *e. g. habeas corpus* cases, are probably without this class.[1] Such appeals and writs of error must be sued out within one year from the rendition of the judgment of a court of appeals sought to be reviewed.[2] The Supreme Court may also exercise appellate jurisdiction over a circuit court of appeals, probably, under other statutes giving it power to issue writs, such as writs of *mandamus* and prohibition.

The Supreme Court has jurisdiction to review by appeal or writ of error the decisions of the supreme courts of the several Territories in those classes of cases in which such a review was provided for by statutes in force when the appellate courts act was passed, and which do not go for appellate review, under section 15 of that act, to a circuit court of appeals. The principal statutes governing appeals and writs of error to review decisions of Territorial supreme courts are cited in a note below.[3] A writ of error from the United States Supreme Court is the appropriate means to obtain a review by that court of the decisions of the supreme court of a Territory, in which law and chancery jurisdiction are exercised together, in those cases in which there is a trial by jury; cases not tried by jury are taken up for appellate review by appeal.[4] The United States

[1] *Accord.* Kurtz *v.* Moffitt, 115 U. S., 487.

[2] Section 6 of act, p. 11.

[3] An act concerning the practice in Territorial courts and appeals therefrom, *ante*, p. 18; an act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories, *ante*, p. 86; an act in relation to courts, etc., in the Territory of Utah, 18 Stat., 253, June 23, 1874; R. S. Sup., 105, 108; R. S., §§ 702, 1909, 1911; an act to provide a temporary government for the Territory of Oklahoma, etc., 26 Stat., 81, May 2, 1890, abstracted, *ante*, p. 14.

[4] *Ante*, p. 18.

Supreme Court does not revise in general, by writ of error or appeal, the decisions of the supreme court of a Territory unless the value in controversy, exclusive of costs, exceeds $5,000.[1] Cases involving the validity of a patent, a copyright, a federal treaty, a federal statute or an authority exercised under the United States are exceptions and are reviewed without regard to the value in controversy.[2] A further exception appears to exist as to decisions of the supreme court of the Territory of Utah in some criminal cases.[3]

The Supreme Court has jurisdiction to review the decisions of the United States court in the Indian Territory as if it were a circuit court of the United States.[4]

The appellate review of the decisions of the district court for the Territory of Alaska is not expressly provided for by the appellate courts act. It is probable that it is to be classed as a district court of the United States within the meaning of that statute, and therefore that the United States Supreme Court has the same jurisdiction to revise its decisions directly by writ of error or appeal that it has to revise the decisions of other district courts.[5] There is nothing in the appellate courts act to show that the term, district court, therein used, refers exclusively to district courts sitting within the States, and the Supreme Court has recently treated the district court for Alaska as an ordinary district court of the United States by holding that it has jurisdiction to issue to it under section 688 of the Revised Statutes a writ of prohibition.[6]

[1] *Ante*, p. 86.

[2] *Id.*

[3] 18 Stat., 253, June 23, 1874, R. S. Sup., 105, 108.

[4] See section 13 of the appellate courts act, *ante*, p. 14, and notes thereto.

[5] Statute establishing a district court in the Territory of Alaska, 23 Stat., 24, May 17, 1884.

[6] *In re* Cooper, 138 U. S., 404.

CHAPTER 4.

RULES OF THE SUPREME COURT OF THE UNITED STATES,

As announced January 7, 1884, together with all subsequent amendments, including the amendments printed in 137 United States Reports.[1]

Rules.

1. Clerk.
2. Attorneys and counsellors.
3. Practice.
4. Bill of exceptions.
5. Process.
6. Motions.
7. Law library.
8. Writ of error, return and record.
9. Docketing cases.
10. Printing records.
11. Translations.
12. Further proof.
13. Objections to evidence in the record.
14. Certiorari.
15. Death of a party.
16. No appearance of plaintiff.
17. No appearance of defendant.
18. No appearance of either party.
19. Neither party ready at the second term.
20. Printed arguments.
21. Briefs.
22. Oral arguments.
23. Interest.
24. Costs.
25. Opinions of the court.
26. Call and order of the docket.
27. Adjournment.
28. Dismissing cases in vacation.
29. Supersedeas.
30. Rehearing.
31. Form of printed records and briefs.

[1] The rules of the Supreme Court which have not been amended are printed from 108 United States Reports. The amendments have been taken from the subsequent United States Reports, and have been inserted at their proper places.

Rules.

32. Writs of error and appeals under the act of February 25, 1889, chapter 236.
33. Models, diagrams, and exhibits of material.
34. Custody of prisoners on habeas corpus.
35. Writs of error under section 6 of the act of February 6, 1889, chapter 113 (25 Stat., 656).

1. CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by Rule 10.

2. ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz.:

I, —— ——, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3. PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4. BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

5. PROCESS.

1. All process of this court shall be in the name of the President of the United States.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6. MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or

that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7. LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

8. WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex

to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Amendment of subdivision 5 of Rule 8, promulgated January 26, 1891. 137 U. S., 710.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9. DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record

after the same shall have been docketed and dismissed under this rule, unless by order of the court.

Amendment of subdivision 1 of Rule 9, promulgated January 26, 1891. 137 U. S., 710.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

Amendment of subdivision 2 of Rule 9, promulgated January 26, 1891. 137 U. S., 710.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska and Idaho.

Amendment of subdivision 4 of Rule 9, promulgated January 26, 1891. 137 U. S., 711.

10. PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case of the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1st, 1884, the case shall be dismissed.

3. Upon payment of either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such

original papers, sent up under Rule 8, Section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk, under Rule 24, Section 7, shall be computed, as at present, on the folios in the record as filed, and

shall be in full for the performance of his duties in the execution hereof.

Section 9 of Rule 10, promulgated March 28, 1887. 120 U. S., 785.

11. TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

12. FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however*, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13. OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14. CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15. DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: *Provided, however*, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceed-

ings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which the suit or writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: *Provided, however*, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: *And provided, also*, That in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding such suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also*, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16. No Appearance of Plaintiff.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17. No Appearance of Defendant.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

18. No Appearance of Either Party.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

19. Neither Party Ready at Second Term.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

20. Printed Arguments.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

Amendment to subdivision 1, Rule 20, promulgated October 31, 1887. 123 U. S., 759.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21. Briefs.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated —

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

22. ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: *Provided, always*, That a fair opening of the case shall be made by the party having the opening and closing arguments.

23. INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

Amendment of subdivision 4 of Rule 23, promulgated March 10, 1890. 133 U. S., 711.

24. COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the

transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3d, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

25. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

26. CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order; (except as hereinafter provided;) and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

Amendment to section 2 of Rule 26, promulgated May 13, 1889. 130 U. S., 706.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general

public interest, may also by leave of the court be advanced on motion of the attorney-general.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together; but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27. ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28. DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29. SUPERSEDEAS.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in the case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30. REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31. FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

32. WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236.

Cases brought to this Court by writ of error or appeal, under the Act of February 25, 1889, Chapter 236, where the final judgment or decree rendered by the Circuit Court does not exceed the sum of five thousand dollars, will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motion to dismiss writs of error and appeals.

Amended Rule 32, promulgated March 10, 1890. 133 U. S., 711.

An amendment of section 3 of Rule 32, promulgated May 5, 1884, 111 U. S., v, is superseded by the present amended Rule 32.

33. MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Amended Rule 33 was promulgated November 23, 1885. 115 U. S., 701.

Ordered, That the following regulations be established under section 765 of the Revised Statutes.

34. CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

Rule 34 was promulgated March 29, 1886, and is printed in the text as amended May 10, 1886. 117 U. S., 708.

Ordered, That the following be adopted as rules of this court under the act approved March 3, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." Strike out "Rule 35" and insert instead thereof the following:

35. ASSIGNMENT OF ERRORS.

1. Where an appeal or writ of error is taken from a district court or a circuit court direct to this court, under section 5 of

the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6 and 9 of Rule 10.

Amended Rule 35 was promulgated May 11, 1891. 139 U. S., 705.

Rule 35 was first promulgated November 3, 1890. 137 U. S., 709. In its original form it related to writs of error in capital cases brought under the act of February 6, 1889. *Ante*, p. 116.

36. APPEALS AND WRITS OF ERROR.

1. An appeal or writ of error from a circuit court or a district court direct to this court, in the cases provided for sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Rule 36 was promulgated May 11, 1891. 139 U. S., 706.

37. CASES FROM CIRCUIT COURT OF APPEALS.

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause shall be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

Rule 37 was promulgated May 11, 1891. 139 U. S., 706.

38. INTEREST, COSTS AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

Rule 38 was promulgated May 11, 1891. 139 U. S., 707.

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APPENDIX.

ORGANIZATION OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

FIRST CIRCUIT.

JUDGES.

HORACE GRAY, CIRCUIT JUSTICE.
LE BARON B. COLT, CIRCUIT JUDGE.

The district judges qualified to sit in this court upon due assignment in order of seniority of commissions are:

THOMAS L. NELSON, DISTRICT JUDGE.
NATHAN WEBB, DISTRICT JUDGE.
GEORGE M. CARPENTER, DISTRICT JUDGE.
EDGAR ALDRICH, DISTRICT JUDGE.

JOHN G. STETSON, *Clerk*, Boston.
WILLIAM W. DOHERTY, *Marshal*.

The first circuit comprises Rhode Island, Massachusetts, New Hampshire, and Maine.

See *ante*, p. 2.

SECOND CIRCUIT.

JUDGES.

SAMUEL BLATCHFORD, CIRCUIT JUSTICE.
WILLIAM J. WALLACE, CIRCUIT JUDGE.
E. HENRY LACOMBE, CIRCUIT JUDGE.

JOHN A. SHIELDS, *Clerk*, New York.
AUGUSTUS C. TATE, *Marshal*.

The second circuit comprises Vermont, Connecticut, and New York.

See *ante*, p. 2.

THIRD CIRCUIT.

JUDGES.

JOSEPH P. BRADLEY, CIRCUIT JUSTICE.
MARCUS W. ACHESON, CIRCUIT JUDGE.
WILLIAM BUTLER, DISTRICT JUDGE.

WILLIAM V. WILLIAMSON, *Clerk*, Philadelphia.
ABRAM D. HARLAN, *Marshal*.

The third circuit comprises Pennsylvania, New Jersey, and Delaware.

See *ante*, p. 2.

FOURTH CIRCUIT.

JUDGES.

MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES.
HUGH L. BOND, CIRCUIT JUDGE.
JOHN J. JACKSON, DISTRICT JUDGE.

HENRY T. MELONEY, *Clerk*, Richmond.
THOMAS S. ATKINS, *Marshal*.

The fourth circuit comprises Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

See *ante*, p. 2.

FIFTH CIRCUIT.

JUDGES.

LUCIUS Q. C. LAMAR, CIRCUIT JUSTICE.
DON A. PARDEE, CIRCUIT JUDGE.
ROBERT A. HILL, DISTRICT JUDGE.

JAMES M. MCKEE, *Clerk*, New Orleans.
NORBORNE T. N. ROBINSON, *Marshal*.

The fifth circuit comprises Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

See *ante*, p. 2.

SIXTH CIRCUIT.

JUDGES.

HENRY B. BROWN, CIRCUIT JUSTICE.
HOWELL E. JACKSON, CIRCUIT JUDGE.
GEORGE R. SAGE, DISTRICT JUDGE.

WALTER S. HARSHA, *Clerk*, Cincinnati.
THOMAS CLAIBORNE, *Marshal*.

The sixth circuit comprises Ohio, Michigan, Kentucky, and Tennessee.

See *ante*, p. 2.

SEVENTH CIRCUIT.

JUDGES.

JOHN M. HARLAN, CIRCUIT JUSTICE.
WALTER Q. GRESHAM, CIRCUIT JUDGE.
HENRY W. BLODGETT, DISTRICT JUDGE.

OLIVER T. MORTON, *Clerk*, Chicago.
LEMUEL O. GILMAN, *Marshal*.

The seventh circuit comprises Indiana, Illinois and Wisconsin.

See *ante*, p. 2.

EIGHTH CIRCUIT.

JUDGES.

DAVID J. BREWER, CIRCUIT JUSTICE.
HENRY C. CALDWELL, CIRCUIT JUDGE.
AMOS M. THAYER, DISTRICT JUDGE.

JOHN D. JORDAN, *Clerk*, St. Louis.
WILLIAM R. HODGES, *Marshal*.

The eighth circuit comprises Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, North Dakota, South Dakota, Wyoming, and the Territories of New Mexico, Oklahoma, and Utah, and the Indian Territory.

See *ante*, pp. 2, 15, and order assigning Territories. 139 U. S., 707. As to the Indian Territory, see *ante*, p. 14.

NINTH CIRCUIT.

JUDGES.

STEPHEN J. FIELD, CIRCUIT JUSTICE.
LORENZO SAWYER, CIRCUIT JUDGE.
MATTHEW P. DEADY, DISTRICT JUDGE.

FRANK D. MONCKTON, *Clerk*, San Francisco.
JOHN C. FRANKS, *Marshal*.

The ninth circuit comprises California, Oregon, Nevada, Washington, Montana, Idaho, and the Territories of Alaska and Arizona.

See *ante*, p. 2, and order assigning Territories. 139 U. S., 707.

RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

The rules recommended by the justices of the United States Supreme Court to the several circuit courts of appeals are printed below. Such changes in these rules as the latter courts have made are stated in notes under the several rules. The changes are stated in detail for each circuit except the ninth. The clerk of the United States circuit court of appeals for that circuit writes the editor under date of July 1, 1891, that the rules of his court are not ready, and adds, "but I do not think that they will materially differ from those recommended by the justices of the Supreme Court."

The rules adopted leave open for future settlement the more important questions considered in this book as to the effect of the appellate courts act of March 3, 1891; for example, these rules do not touch the question how far that act repeals prior statutes providing for a direct appeal to the United States Supreme Court, nor the question whether that act permits a direct appeal to the Supreme Court to test the jurisdiction of the court below upon the rendition of an interlocutory judgment by it affirming its jurisdiction.

The only decision of the Supreme Court which construes the appellate courts act of March 3, 1891, and which has been officially published, to the time of preparing this appendix for the press, is *In re* Claasen, 140 U. S., 200, holding, *inter alia*, that the Supreme Court and the justices thereof have power since March 3, 1891, to grant a *supersedeas* in a criminal case of which that court can take appellate jurisdiction; and that the right of a party to a bill of exceptions stands as it did at the time of the trial to which the bill of exceptions refers.

Rule 1. Name.

The court adopts "United States Circuit Court of Appeals for the First Circuit" as the title of the court. [Change the word "First" as necessary.]

Adopted in the first eight circuits as proposed, with the necessary numerical changes in the names of the circuits.

Rule 2. Seal.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "First Circuit" in two lines, in the centre, with a dash beneath. [Change the word "First" as necessary.] [See specimen of seal below.]

[*Design of Seal.*]

Adopted in the first circuit, omitting the words in brackets, and adding "as follows:"

Adopted in the second, third, fourth, fifth, sixth, seventh and eighth circuits as proposed with the necessary numerical changes in the names of the circuits.

Rule 3. Terms.

One term of this court shall be held annually at the city of Boston on the of October, and shall be adjourned to such times and places as the court may from time to time designate. [Fill the blank and change the word "Boston" as necessary, according to the act.]

Adopted in the first circuit as proposed, omitting the words in brackets, and inserting "first Tuesday" in the blank.

Adopted in the second circuit as proposed, substituting "New York" for "Boston," and filling the blank with the words "last Tuesday."

Rule 3 in the third circuit is as follows:

The terms of this court will commence and be held on the third Tuesday of March and the third Tuesday of September in each year, except the present term, at the city of Philadelphia.

Adopted in the fourth circuit as proposed by the justices of the Supreme Court, with "Richmond" substituted for "Boston," and the time of meeting left blank. The clerk announces that the court will meet in regular session on Tuesday after the first Monday of February, 1892, and that the annual term day mentioned in Rule 3 will be fixed at that time.

Adopted in the fifth circuit as proposed, with "New Orleans" substituted for "Boston," and "the third Monday of November" inserted as the date on which the annual term shall begin.

Adopted in the sixth circuit as proposed, substituting "Cincinnati" for "Boston," and filling the blank with the words "first Monday."

In the seventh circuit Rule 3 is as follows:

A term of this court shall be held, annually, at the city of Chicago, on the first Monday in October, and continue until the first Monday in October of the succeeding year. Each term shall be adjourned to such times and places as the court may from time to time designate. The first regular term shall commence on the first Monday in October, 1891.

Adopted in the eighth circuit as proposed, substituting "St. Louis" for "Boston," and filling the blank with the words "second Monday."

Rule 4. Quorum.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

Adopted in the first eight circuits as proposed.

Rule 5. Clerk.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court.

Adopted in the first, second, third, fourth, sixth, seventh and eighth circuits as proposed.

In the fifth circuit Rule 5 is the same, except that it designates the city of New Orleans by name as the place of keeping the clerk's office, and fixes his bond at $10,000.

Rule 6. Marshal, Crier, and Other Officers.

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

Adopted in the first, second, third, fourth, sixth, seventh and eighth circuits as proposed.

In the fifth circuit Rule 6 is the same, except that it fixes the marshal's bond at $10,000.

Rule 7. Attorneys and Counsellors.

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court

of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

Adopted in the first, second, fourth, fifth and seventh circuits as proposed.

In the third circuit Rule 7 is the same, with words added as follows:

And all attorneys and counsellors of the Circuit Court of the United States for the Third Circuit shall be attorneys and counsellors of this court without taking any further oath.

In the sixth circuit Rule 7 is as proposed by the justices of the Supreme Court, with words added as follows: "A certificate of such admission, if demanded, shall be furnished upon the payment of a clerk's fee of two dollars and fifty cents."

In the eighth circuit Rule 7 is as follows:

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, or in the Supreme Court of any State in this circuit may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

Rule 8. Practice.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

Adopted in the first eight circuits as proposed.

Rule 9. Process.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

Adopted in the first eight circuits as proposed.

Rule 10. Bill of Exceptions.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

Adopted in the first eight circuits as proposed.

Rule 11. Assignment of Errors.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

Adopted in the first eight circuits as proposed.

Rule 12. Objections to Evidence in the Record.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Adopted in the first eight circuits as proposed.

Rule 13. Supersedeas and Cost Bonds.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount

sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

Adopted in the first eight circuits as proposed.

RULE 14. WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed * shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty † days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court.

Adopted in the first, second, fourth, fifth, sixth and seventh circuits as proposed.

In the third circuit Rule 14 is the same except that the words "upon being paid or tendered his fees therefor" are inserted at the asterisk (*).

In the eighth circuit Rule 14 is the same except that the number "sixty" is substituted for "thirty" at the dagger (†).

RULE 15. TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

Adopted in the first eight circuits as proposed.

RULE 16. DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

Adopted in the first eight circuits as proposed.

RULE 17. DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order,

and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

Adopted in the first eight circuits as proposed.

Rule 18. Certiorari.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

Adopted in the first eight circuits as proposed.

Rule 19. Death of a Party.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however*, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the

suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: *Provided, however*, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: *Provided, also*, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also*, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

Adopted in the first eight circuits as proposed.

Rule 20. Dismissing Cases.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be

due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

Adopted in the first eight circuits as proposed.

Rule 21. Motions.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

Adopted in the first eight circuits as proposed.

Rule 22. Parties Not Ready.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

Adopted in the first eight circuits as proposed.

Rule 23. Printing Records.

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party, at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the

record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

Adopted in the first seven circuits as proposed.

In the eighth circuit Rule 23 is as follows:

On the filing of the transcript in every case the clerk shall forthwith cause the same to be printed, and shall furnish three copies of the printed record to each party at least thirty days before the argument.

The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record before ordering the same to be done.

If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed.

In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

Rule 24. Briefs.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six * days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated —

(1.) A concise abstract, or statement of the case, presenting succintly the questions involved, in the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in

support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. Where there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Adopted in the first seven circuits as proposed.

In the eighth circuit, Rule 24 is the same, except that the number twenty is substituted for six at the asterisk (*).

RULE 25. ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

Adopted in the first eight circuits as proposed.

Rule 26. Form of Printed Records, Arguments, and Briefs.

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

Adopted in the first eight circuits as proposed.

Rule 27. Copies of Records and Briefs.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

Adopted in the first eight circuits as proposed.

Rule 28. Opinions of the Court.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.
2. The original opinions of the court shall be filed with the clerk of this court for preservation.
3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Adopted in the first, second, fourth, fifth, seventh and eighth circuits as proposed.

In the third circuit Rule 28 is as follows:

1. All written opinions delivered by the court shall be delivered to the clerk and recorded.
2. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

In the sixth circuit Rule 28 is as proposed by the justices of the Supreme Court, except that it omits section 3.

Rule 29. Rehearing.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

Adopted in the first eight circuits as proposed.

Rule 30. Interest.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

Adopted in the first eight circuits as proposed.

Rule 31. Costs.

1. In all cases where any suit shall be dismissed in this court,* except where the dismissal shall be for want of jurisdiction,* costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

Adopted in the first seven circuits as proposed.

In the eighth circuit Rule 31 is the same, except that it omits the words between asterisks (* — *) in the first section.

Rule 32. Mandate.

In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo*, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Adopted in the first eight circuits as proposed.

Rule 33. Custody of Prisoners on Habeas Corpus.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decison of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

Adopted in the first eight circuits as proposed.

Rule 34. Models, Diagrams, and Exhibits of Material.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Adopted in the first eight circuits as proposed.